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IN THE

Supreme Court of the United States

October Term, 1980

CARL F. PAGE
Petitioner

v.

WILLIAM J. BOLGER

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1792

Carl F. Page,

Appellant,

versus

William J. Bolger,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued October 7, 1980

Decided April 2, 1981

Before HAYNSWORTH, Chief Judge, WINTER, BUTZNER, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE and ERVIN, Circuit Judges, sitting en banc.

Kenneth V. Farino (Farino, Oksman, Rick & Kincannon on brief) for Appellant; Marleigh D. Lang, Department of Justice (William B. Cummings, United States Attorney, Eliot Norman, Assistant United States Attorney, Anthony W. DuComb, United States Postal Service, Labor Law Division on brief) for Appellee.

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to which Page sought promotion. The panel decision remanded with directions to award specified compensatory and injunctive relief. Page v. Bolger, No. 78-1792 (4th Cir. Dec. 19, 1979). Upon petition of the Postmaster General, the appeal was then reheard by the court sitting en banc.

Concluding that the district court committed no reversible error in determining that, under the proof scheme adopted for analyzing claims of disparate treatment in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Page had failed to establish his claim of discrimination, we affirm the judgment

dismissing his action on the merits.[1/]

I

The relevant historical facts, as adduced in evidence before the district court, are not in significant dispute.[2/] Page, a black, was a foreman in the mails section of the Richmond Post Office. In January 1976, he was one of several

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1 Page also challenged on this appeal the district court's denial of his motion for leave to amend his complaint to allege a class action. Citing the imminence of trial, scheduled for the next month, and the completion of discovery, the district court declined in its discretion to allow the amendment or to grant an accompanying request for continuance. The panel which first heard this appeal unanimously found no abuse of discretion in this ruling and affirmed it. We agree.

2/ The factual summary that follows is adopted, with some change, from that employed in the superseded opinion of the panel that originally heard the appeal. Page v. Bolger, No. 78-1972, slip. op. at 2-5 (4th Cir. Dec. 19, 1979).

applicants for general foreman of mails, a supervisory position designated as postal executive salary level 17 (PES-17). The Postal Service's Personnel Handbook provides that a review committee shall be designated to screen the applicants and to recommend the "most outstanding candidates" to the appointing officer, who in this case was the postmaster.[3] The committee must consist of at least three members who are to be representatives of the district office, the installation with a vacancy, and the sectional center.[4] Section 544.2 of the Personnel Handbook provides:

> Review committee members must be at an organizational or grade level equal to or higher

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[3] Id. § 544.3-1.

[4] Id. § 544.1-2.

> than that of the vacant position. The official who designates a review committee is responsible for making every effort to select at least one woman and/or one minority group member. In the absence of available women and/or minority employees at the appropriate level, committee members must be furnished by the next-higher organizational unit, where available.

The district manager appointed a review committee of three white males to consider the applicants for the PES-17 position. While the committee found that Page was qualified, it also determined that two white males were better qualified. The committee recommended these three applicants to the postmaster, who selected the top-ranked white male.[5/]

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[5] The postmaster testified that it was his practice to appoint the applicant whom the committee had ranked first, although §§ 545.1-.2 of the Personnel Handbook do not require him to accept the recommendations.

The appointee previously had been administratively detailed to the position pending the outcome of the committee's recommendations. Page protested this appointment and filed a complaint with the Equal Employment Opportunity Commission.

In August 1976, Page sought promotion to postal operations specialist (PES-18). Again the district manager appointed three white males to the review committee. During Page's interview, one of the committee members questioned him about his EEO complaint regarding the PES-17 position. The committee found that Page was qualified for the position, but it named one white male as better qualified. It ranked another white male third. The postmaster selected the top-ranking white male. Again Page protested and filed an EEO complaint. The district manager

voided the action of the review committee because of the interrogation about Page's EEO complaint with respect to the PES-17 position. He directed that a new committee be selected and that one of its members be a black employee.

In February 1977, the new committee met to reconsider the PES-18 appointment. A black employee from Philadelphia had been named to the committee, but when the committee met, his assignment to a new job prevented his serving on it. A white male was substituted. This committee, consisting of three white males, found Page to be qualified for the position, but it concluded that two white males, including the applicant previously ranked third, were better qualified. The top-ranking applicant was the employee who has been recommended in 1976. He had

been detailed administratively to the position pending reconsideration by the new review committee. The postmaster accepted the recommendation of the new committee and appointed the incumbent. Page protested and filed another EEO complaint.[6/]

After exhausting his administrative remedies with respect to both the PES-17 and -18 appointments, Page filed this action.

II

The district court conducted a de novo hearing in accordance with Chandler v. Roudebush, 425 U.S. 840 (1976), receiving essentially the evidence above

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[6] Both EEO complaints were decided against Page. Page v. Bolger, No. CA-77-0400-R (E.D. Va. Aug. 16, 1978) (unpublished memorandum order).

summarized. It then analyzed this evidence under the proof scheme adopted by the Supreme Court in McDonnell Douglas as a "sensible, orderly way to evaluate the evidence," Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978), where individual claims of "disparate treatment" - of intentional discrimination in making employment decisions - are put in issue by conflicting evidence as to the employer's motivation in making them.

In the first stage of this analysis, the court found, and the Postmaster General has conceded throughout, that Page's evidence established a prima facie case of discrmination in denying him the promotions he sought. As to these, the evidence showed, in summary, that (i) he belonged to a racial minority; (ii) that he applied and was qualified for the pro-

motions he sought; (iii) that he was denied them; and (iv) the positions thereafter remained open and were in fact filled by the employer from other applicants possessing his general qualifications. Cf. McDonnell Douglas, 411 U.S. at 802 & n.13 (refusal to hire). This unchallenged conclusion is manifestly not in error.

At this point, with the inference of discriminatory motive for denying the promotion raised, the burden is considered shifted to the employer to dispel the inference by coming forward with evidence that a "legitimate, nondiscriminatory reason," id. at 802, rather than the inferable reason of purposeful discrimination, underlay the decisions to deny

promotion.[7] The district court found this burden of production carried and the inference of discrimination sufficiently dispelled by the testimony of review committee members that they did not discriminate against Page because of his race but instead simply considered him relatively less qualified on a subjective and objective basis than the successful applicants. We find no error of law nor clear error of fact underlying this conclusion.

Obviously it must be possible for employers legally to make employment

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[7] We have recently discussed the nature and basis of the inference raised by the McDonnell Douglas prima facie case and the burden thereby imposed to dispel it in Wright v. National Archives and Records Service, 609 F.2d 702 (4th Cir. 1979) (en banc).

decisions that disfavor qualified minority employees on the basis of a comparative evaluation of their qualifications with those of other applicants. Concededly, when that evaluation is to any degree subjective and when the evaluators are themselves not members of the protected minority, the legitimacy and nondiscriminatory basis of the articulated reason for the decision may be subject to particularly close scrutiny by the trial judge. But, as the Supreme Court pointed out in McDonnell Douglas itself, the mere fact that subjective criteria are involved in the reason articulated by an employer does not prevent according it sufficient rebuttal weight to dispel the inference of discrimination raised by the prima facie case. Id. at 803. Here, aside from the

testimony - obviously credited by the district judge - of the persons who actually made the promotion decisions that they were not racially motivated, there was objective evidence supporting the comparative evaluation they made.[8/] Con-

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[8] There is no gainsaying that Page's qualifications, objectively assessed in relation to those of the successful applicants, would have justified his selection in the exercise of a rational business judgment. This is illustrated by the comments of the appeals examiner who conducted the administrative hearing on Page's EEO complaint respecting the PES-18 position. He first compared in tabular form the relative objective qualifications of Page and the successful applicant, and then summarized:

> This comparison shows that [Page] has more formal education than the [appointee] and slightly more supervisory experience than [the appointee]. On the other hand, the [appointee] has a higher performance evaluation (although both evaluations are close to outstanding in nature) and greater length of service than [Page]. Both

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sidering that the proof burden being assessed is at this point merely one of production rather than of persuasion, see Wright, 609 F.2d at 714 n.13, we cannot find error in the district court's conclusion that it has been carried.

(fn. 8 continued)

> employees appear to be highly qualified for the position; therefore, the examiner does not believe it is clear, from this comparison, that [Page] is better qualified than the [appointee] for the position in question.

In re Complaint of Carl F. Page, Dec. No. PH071380132, slip op. at 13 (July 12, 1978).

The examiner also observed "that the selection process was highly subjective," and suggested improvements to reduce "the great margin of subjective inconsistency among the panel members' evaluation of the candidates." Id. at 12.

The examiner's ultimate conclusion that on the record he reviewed there was a rought tossup in objective qualification

reasons advanced by the employer . . . , but the underlying requirement remains to prove that the real as opposed to now specifically 'articulated' reasons was a racially inspired intent to treat less favorably." Wright, 609 F.2d at 716.

It was in this connection that the district court considered the postal authorities' asserted failure to follow the Postal Service guidelines for composing the promotion review committees. Looking specifically to the evidence regarding the way in which the committees were composed, the court found that there was no black employee in the Richmond Post Office who was qualified to serve on the PES-17 committee, and that following the failure of the appointed black member of the PES-18 to serve, there was no reasonable replacement available at the

critical time. From this the court concluded:

> Though neither the first nor the second Review Committee contained a minority member, "every effort" was made to obtain one for the second meeting. This lack of a minority member must be weighed against the proper questions asked the applicants, the obvious concern by the Committee members for the applicant's ability to do the job, and the lack of bias on the part of the Committee members. Further, no law requires that there be any particular racial composition in Review Committees.

Page v. Bolger, No. CA-77-0400-R (E.D. Va. Aug. 16, 1978).

We think that this properly addressed the "pretext" inquiry and, again, we can find no reversible error of fact or law in the district court's conclusion that the articulated reason of better relative qualification was not a mere pretext. In addition to the fact that

this finding rested largely upon assessments of credibility and the resolution of conflicting permissible inferences - matters on which we are commanded by Fed. R. Civ. P. 52(a) to accord great deference to the trial judge's superior vantage point - we think there is evidence other than the testimony of the decisionmakers that supports the finding. As a result of possibly questionable conduct by one of the original PES-18 committee members, the district manager directed reconstitution of the committee to avoid any real or suggested racial bias. When no qualified black employee was available to serve on it from the local post office, one from a relatively distant post office was appointed in an effort to insure minority representation. These actions were directly relevant to the pretext

inquiry - as conduct of the employer probative of likely motivation for the ultimate employment decisions. See Furnco, 438 U.S. at 580; McDonnell Douglas, 411 U.S. at 804-05; Wright, 609 F.2d at 716-17.

In summary, when the district court assessed the evidence under the McDonnell Douglas formula - a mode of analysis which both parties agreed in the trial court was appropriate - it found: (1) claimant's prima facie case established; (2) the inference of discriminatory intent thereby raised effectively dispelled by defendant's articulation of a "legitimate nondiscriminatory reason," i.e., better relative qualifications of others; and (3) this reason not shown to be a mere pretextual cover for discriminatory motive behind the decisions not to pro-

mote. In this process, we think the court adhered faithfully to the appropriate mode of analysis and to the issues as framed by the pleadings and addressed in proof by both parties. Bearing in mind that under the disparate treatment theory relied upon by claimant the burden of persuasion remained with him throughout to prove by a preponderance of the evidence that he was "treated less favorably than others because of [his] race," International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 & n.15 (1977), in respect of specific "personnel actions," 42 U.S.C. § 2000e-16(a), we conclude that the district court's findings of fact and conclusions of law against the claimant on this ultimate issue were neither erroneous in law nor clearly erroneous in fact.

III

Apparently realizing that under this mode of analysis the district court's assessment of the evidence is probably unassailable on review, Page has urged on appeal a modification of the McDonnell Douglas formula, which it is contended will better serve the remedial purposes of Title VII in the particular factual context of this case. Briefly summarized, this modification would focus the McDonnell Douglas inquiry upon the process by which the review committees were constituted, and would make decisive in claimant's favor the fact that - in asserted violation of the plain intent of the Postal Service's interlal guidelines[9]/

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[9] See text at notes 2-4 supra. The Postmaster General does not concede that the guidelines have in any event been

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- they included no minority members. The specific modification urged is that used by the panel majority, which first heard this appeal, as a basis for finding reversible error in the district court's assessment of the evidence. Under it the claimant would establish a prima facie case by showing that (1) he belonged to a minority; (2) he qualified for the position; and (3) he was denied promotion because of an evaluation by a review committee consisting of only white males. At this point the employer would be re-

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(fn. 9 continued)

violated. On the contrary, pointing to the admonitory language which imposes only the "responsib[ility] for making every effort to select at least one . . . minority . . . member" for review committees, Postal Service, Personnel Handbook § 544.2, he contends that the evidence shows compliance. In view of our disposition of the appeal, we have no need to address this question.

quired to articulate some nondiscriminatory reason for the absence of a minority member on the review committee. If this were done, the pretext inquiry would then focus on this reason, rather than the articulated reason for denying the promotions.

This modification is claimed to be justified because the McDonnell Douglas analytical framework has been recognized as a flexible one requiring adaptation to different fact patterns, see Furnco, 438 U.S. at 575-76. It is claimed to be required by the fact that here the affirmative action guideline asserted to have been violated has the force of law as a regulation.[10/]

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[10] The contention is that the Postal Service's Personnel Handbook provisions

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We reject this as an appropriate basis for analyzing the evidence in this case. While we recognize that the McDonnell Douglas proof scheme is not to be given a wooden application that loses sight of its essential purpose as merely a "sensible, orderly way to evaluate the evidence," Furnco, 438 U.S. at 577, we are

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(fn. 10 continued)

enjoining "every effort" to insure minority representation on the review committee, see note 9 supra, traces its lineage to statutory mandate.

Section 717(b) of Title VII, 42 U.S. C. § 2000(e)-16(b), authorizes the Civil Service Commission to enforce the substantive antidiscrimination provisions of subsection (a); delegates rulemaking power for the purpose; and directs compliance by covered agency heads. Pursuant to the statutory mandate, the Civil Service Commission has promulgated regulations, 29 C.F.R. §§ 1613.201-.643 (1979), which require the head of the Postal Service, along with other agency heads, to establish "a continuing affirmative action program," 29 C.F.R. § 1613.203, and specifically to "[c]onduct a continuing campaign to eradi-

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satisfied that the modification here urged would amount to a complete substantive shift of focus from the appropriate object of inquiry where employment discrimination by disparate treatment is claimed. Aside from the fact that this

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(fn. 10 continued)

cate . . . discrimination . . . from the agency's personnel policies and practices and working conditions, . . ." 29 C.F.R. § 1613.203(b). The Postal Service's Personnel Handbook, is thus arguably a part of the Postal Service's regulations, which, tracing their lineage to § 717(b), has the force of law.

For purposes of this appeal we can accept this proposition. That, under United States v. Caceres, 440 U.S. 741, 749 (1979), the regulation therefore would be entitled to enforcement by a federal court, does not in our view mean that, if violated, its violation must be redressed as if it constituted a direct violation of substantive provisions of Title VII. On this appeal we have no occasion to consider other means by which, if violated, it might have been enforced in Page's behalf.

contention in effect introduces on appeal a new and dispositive theory neither advanced nor considered in the district court, its adoption would constitute an erroneous departure from settled and fundamental substantive principles under Title VII.

The proper object of inquiry in a claim of disparate treatment under § 717 is whether there has been "discrimination" in respect of "personnel actions affecting [covered] employees or applicants for employment . . . ." 42 U.S.C. § 2000e-16 (a) (emphasis added). Disparate treatment theory as it has emerged in application of this and comparable provisions of Title VII, most notably § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1), has consistently focused on the question whether there has been discrimination in what could be character-

ized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating. This is the general level of decision we think contemplated by the term "personnel action" in § 717. It is the level focused upon in the major Supreme Court decisions establishing and refining the substantive and procedural elements of individual disparate treatment theory. See, e.g., Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24-25 & nn.1 & 2 (1978) (failure to promote); Furnco, 438 U.S. at 576-77 & n.8 (failure to hire); McDonnell Douglas, 411 U.S. at 802 (same). See also B. Schlei & P. Grossman, Employment Discrimination Law 15 (1976). It is the level upon which the district court in the instant case - with the acquiescence there of both parties - focused the

McDonnell Douglas analysis. As seems plain from the record, the court and the parties were there agreed that the "personnel actions" in issue were the decisions denying to Page and giving to others the positions that each sought and only one could be given. These were the decisions to which it was thought Page's prima facie showing of discriminatory motive was properly addressed and weighed. It was clearly these decisions for which a "legitimate, nondiscriminatory reason" was sought in defendant's rebuttal evidence. Finally, it was these decisions whose nondiscriminatory quality was considered in issue for purposes of assessing the possible "pretextual" nature of the reasons given for them by the defendant. As earlier indicated, we are satisfied that the McDonnell Douglas analysis

at 712 n.10. By the same token, it is obvious to us that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of § 717 and comparable provisions of Title VII. We hold here merely that among the latter are mediate decisions such as those concerning composition of the review committees in the instant case that are simply steps in a process for making such obvious end-decisions as those to hire, to promote, etc.

To apply the modified McDonnell Douglas analysis urged by Page would do much more than merely modify a procedurally tidy proof scheme. Its practical effect would be a profound substantive one by which these mediate decisions were drawn

within the coverage of those "personnel actions" directly covered by § 717.[11/] By this means a proven violation of the Postal Service's statutorily mandated "affirmative program," 29 C.F.R. § 1613.203, designed to eradicate discrimination, 29 C.F.R. § 1613.203(b), would be made a

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11 This would occur in the following way. Under the straight McDonnell Douglas analysis used by the district court, with denial of promotion taken as the focus of inquiry, the composition of the review committee is significant, perhaps highly so, but only as it relates to the pretextual nature of the reason given for the denial of promotion, as to which the claimant has the burden of proof. Under the modified analysis, the focus of inquiry would shift completely to composition of the review committee, with the burden imposed upon the employer to justify that composition at peril of being found in violation of the substantive prohibitions of § 717(a).

violation of Title VII itself. Affirmative action undertakings by government employers would come in practical terms to define the standards for compliance with Title VII's antidiscrimination provisions. We do not think this could accord with Congressional intent. See Wright, 609 F.2d at 718.

AFFIRMED.

BUTZNER, Circuit Judge, with whom WINTER and SPROUSE, Circuit Judges, join, dissenting:

This case illustrates once again the racial discrimination black employees encounter when they seek advancement to the higher echelons of the federal establishment.[1] Although Carl F. Page was

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1. Wright v. National Archives, 609 F.2d 702, 718-19 (4th Cir. 1979)(Butzner, J., dissenting), refers to the legislative history in which Congress concluded that

well qualified for the promotions he sought, he was twice denied advancement by illegally constituted, racially segregated promotion review committees. Having failed to conform to a regulation designed to put an end to this practice, the Postal Service justified its refusal to promote Page by relying on the self-professed fairness of the members of its committees. The district court accepted this testimony as dispositive of this case.

Abuse of the power to select review committees, coupled with the improbability that any federal official is likely to confess that he discriminated on the basis

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(fn. 1 continued)
the government has failed "to pursue its policy of equal opportunity."

of race in recommending a promotion, has enabled the middle ranks of the postal bureaucracy to erect an almost impregnable barrier to the goal of equal opportunity that Congress sought to achieve. This barrier should be breached by rejecting as a basis of decision the self-serving, subjective testimony of the illegally appointed committee members. Employees protesting racial discrimination with respect to promotion should prevail when, upon proper analysis of the evidence, they prove that the Postal Service has violated the regulation that was intended to abolish racially segregated review committees.

I

The Postal Services' Person-

nel Handbook[2] provides that a review committee shall be designated to screen the applicants for promotion to positions classified within the postal executive salary level (PES) and recommend the "most outstanding candidates" to the appointing officer, who in this case was the postmaster.[3] The committee must consist of at least three members.[4] Section 544.2 of the Handbook requires the appointing officer to make "every effort" to assure diversity in the committee. It states in part:

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2. Postal Service, Personnel Handbook P-11, TL-4 (Dec. 31, 1975).

3. Id. § 544.3-1.

4. Id. § 544.1-2.

> The official who designates a review committee is responsible for making every effort to select at least one woman and/or one minority group member. In the absence of available women and/or minority employees at the appropriate level, committee members must be furnished by the next-higher organizational unit, where available.

The genesis of this regulation is found in the 1972 Amendments of Title VII of the Civil Rights Act of 1964. Section 717 of Title VII as amended[5] provides in subsection (a) that "[a]ll personnel actions affecting employees . . . in the United States Postal Service . . . shall be made free from any discrimination based on race . . . ." Subsection (b) authorizes the Civil Service Commision to enforce the provision of subsection

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5. 42 U.S.C. § 2000e-16.

(a) and directs the Commission to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." The statute also provides that "[t]he head of each department, agency, or unit shall comply with such rules, regulations, orders, and instructions . . . ."

In compliance with the mandate of § 717, the Civil Service Commission promulgated regulations[6] in 1972 which require the head of each government agency, including the Postal Service, to establish, maintain, and carry out "a continuing affirmative program designed to promote equal opportunity in every

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6. These regulations have been codified in 5 C.F.R. §§ 713.201 to 713.643 (1978).

aspect of agency personnel policy and practice in the . . . advancement . . . of employees."[7] A specific directive of the regulations provides that the agency shall "[c]onduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, religion, sex, or national origin, from the agency's personnel policies and practices and working conditions . . . ."[8] Further the agency must "[d]evelop the plans, procedures, and regulations necessary to carry out its program of [equal opportunity]."[9]

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7. 5 C.F.R. § 713.203.

8. 5 C.F.R. § 713.203(b).

9. 5 C.F.R. § 713.204.

The regulations of the Postal Service include "[t]he Headquarters Manuel, Regional Instructions, handbooks, delegations of authority, and other regulatory issuances and directives of the Postal Service or the former Post Office Department."[10] Consequently, the Postal Service's Personnel Handbook is a part of the Service's regulations. The edition applicable to these proceedings was issued as Publication 194, entitled Guide to Promotion and Reassignment, in May 1975.[11] The Guide's release was

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10. 39 C.F.R. § 211.2(a).

11. Section 544.2 of the Handbook is designated as ¶ C(4) of the Guide. A Postal Service employee testified that the Guide was initially issued in 1973. He added that prior to its issuance there had been "many accusations of favoritism in the selection of people for promotion."

announced in Postal Bulletin 21038 which states that it will govern "all promotions and reassignments to covered positions . . . ." A memorandum from the Eastern Regional Postmaster General dated June 6, 1975, directed every manager to follow it in filling PES positions. The memorandum offered "any assistance needed for implementing this vital program affecting our employees." The Guide was incorporated in the Personnel Handbook §§ 540 to 553 on December 31, 1975.

In United States v. Caceres, 99 S.Ct. 1465, 1470 (1979), which dealt with the application of the exclusionary rule to evidence obtained in violation of an agency regulation, the Court said, "A court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Consti-

tution or federal law." This principle is applicable to Page's claim. The equal protection component of the fifth amendment's due process clause bars federal agencies from discriminating against their employees because of race. Congress implemented this constitutional provision by enacting the Equal Opportunity Act of 1972.[12] The lineage of the Handbook can be traced from § 717 of this Act,[13] through the Civil Service regulations,[14] and the Postal Service's regulations.[15]

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12. Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1972), 42 U.S.C. § 2000e et seq. (1972)

13. 42 U.S.C. § 2000e-16. See text at n.8, supra.

14. 5 C.F.R. §§ 713.203 and 713.204. See text at nn.9-12, supra.

15. 39 C.F.R. § 211.2(a)(3). See text at n.13, supra.

Thus, it is apparent that § 544.2 of the Handbook, pertaining to the racial composition of review committees, was promulgated to enforce the fifth amendment and § 717 of Title VII. Therefore, in accordance with Caceres, § 544.2 of the Handbook is mandatory, and the Postal Service was under a duty to follow it.

It was error for the district court to buttress dismissal of Page's claim on its ruling that "no law requires that there be any particular racial composition in Review Committees." While it is true in a literal sense that Congress did not enact the regulation, it specifically required the promulgation of regulations to implement § 717 of Title VII. The regulation therefore has the force of law.

ing to race, defeated his substantive right to be considered for appointment regardless of his race.

II

Although § 544.2 does not require every review committee to have a minority member, it places on the official designating the committee the responsibility of making "every effort" to select such a member. Moreover, in the absence of a qualified minority employee at the local level, "members must be furnished by the next-higher organizational unit, where available."[16]

Drawing on principles explained in Furnco Construction Co. v. Waters, 438 U.S. 567, 575-78 (1978), "a sensible, orderly way to evaluate the

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16. See text at n.4, supra.

evidence,"[17] on this issue is as follows: (1) When a qualified, minority employee proves that a review committee was composed only of white males, (2) the

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17. The Court pointed out that the allocation of the burden of proof was never intended to be "rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." 438 U.S. at 577. Although Furnco and its antecedent, McDonnel Douglas Corp. v. Green, 411 U.S. 792 (1973), dealt with a different factual issue, we believe their method of analysis, modified to reflect the facts, is appropriate here. See Furnco, 438 U.S. at 575-76. "Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof." Teamsters v. United States, 431 U.S. 324, 358 and 359 n.45 (1977).

Postal Service must articulate some legitimate, nondiscriminatory explanation for the absence of a minority member--that is, despite reasonable efforts to secure such a member, none was available. (3) The burden then shifts to the employee to establish that the "proffered justification is merely a pretext for discrimination." 438 U.S. at 578. To carry his burden, the employee must prove discriminatory motive which can be established by either direct or circumstantial evidence as well as by inference. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

With regard to the PES-17 committee, the district court found that at the local level there was no black employee of sufficient rank qualified to serve.

Page asserts that this finding should be set aside because the postmaster testified that he would have furnished a black station master had he been asked to do so. Page's argument must be rejected because the Postal Service presented testimony that station masters, although of sufficient rank, lack the necessary experience. Page did not show that this explanation was a pretext. Applying the analysis adopted from Furnco, the district court's finding must be accepted.

The designating officer's duty, however, was not discharged by simply canvassing the local level. Section 544.2 obliged him to secure a minority member from the next higher organizational unit, where available. The record does not disclose, and the Postal Service does not contend, that any effort was made to ob-

tain a black employee from the next higher level. Since the Service has articulated no reasonable explanation for not selecting a minority member from a next higher organizational unit, it is apparent that it has not satisfied step 2 of the modified Furnco analysis. The Postal Service therefore did not comply with § 544.2 when the PES-17 committee was named.

The district court's findings and conclusions concerning the composition of the second PES-18 committee are based largely on the administrative hearing transcript and the decision of the appeals examiner which were made a part of the record of this civil action. The administrative record discloses that a black employee from Richmond and another from Norfolk were qualified to serve on review

committees. The Postal Service offered an explanation for the absence of the Richmond employee, which Page did not show was a pretext. The Service satisfied the modified Furnco analysis, and we find no failure to comply with § 544.2 because the Richmond employee was not designated to serve on the committee.

The examiner noted that neither Page nor the Postal Service had offered evidence to show the availability of the Norfolk employee, who also was from the local level. The examiner ruled against Page on this point. This ruling was erroneous. It is undisputed that the PES-18 committee was composed of white males. Consequently, the burden was on the Service, not Page, to articulate some legitimate explanation why the Norfolk employee had not been selected.

Furthermore, when the black employee from the Eastern Regional Office became unable to serve on the PES-18 committee, a white employee was substituted. At the administrative hearing, the Postal Service offered no explanation for the substitution of a white employee when the designating officer specifically had requested a black employee in order to comply with § 544.2. There is no suggestion in the administrative record that another black employee from the Regional Office was not available. The examiner's ruling against Page on this point was erroneous. The substitution of a white employee for the black committee member, absent some reasonable explanation for the change in the racial composition of the committee, does not satisfy step 2 of the modified

Furnco analysis. At the de novo hearing, the Postal Service did not supplement the record to remedy the deficiencies of its position at the PES-18 administrative hearing. Therefore, the district court's reliance on the administrative record and decision was misplaced.

The Postal Service did not comply with § 544.2. The review committees, which weighed the relevant qualifications of Page and the successful appointees for the PES-17 and 18 positions, were constituted improperly with respect to race.

III

Once it is concluded that the Postal Service assembled racially segregated review committees in violation of anti-discrimination regulations which had the

force of law, it is a simple matter to fit that conclusion into the traditional McDonnell Douglas formula. The district court found, and the Postal Service now concedes, that Page proved a prima facie case of discrimination in accordance with the familiar McDonnell Douglas analysis. In Texas Department of Community Affairs v. Burdine, 49 U.S.L.W. 4214, 4215-16 (March 4, 1981), the Court reviewed the allocation of burdens and order of presentation of proof prescribed by McDonnell Douglas. In the following terms it explained the defendant's obligation after the plaintiff has proved a prima facie case:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory

> reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.

The Postal Service failed to satisfy this test. Its explanation for deeming the white applicants superior to Page rested on the evaluation of the applicants by racially segregated review committees that were appointed in violation of the regulations governing their function. An employer's reliance on the subjective

judgment of individuals whose power to make an employment decision exists only by virtue of a flagrant disregard for mandatory anti-discrimination regulations cannot suffice as a legitimate non-discriminatory reason for the action. Since the Postal Service seeks to justify its action only by reliance upon its own unlawful conduct, Page's prima facie case stands unrebutted. Under these circumstances, neither McDonnell Douglas nor Burdine requires Page to prove in addition that the ratings made by the illegally constituted committees were a pretext. He is entitled to prevail on the basis of his unrebutted prima facie case. See Burdine, 49 U.S.L.W. at 4216.

It is certainly true that nothing in Title VII prohibits an employer from relying on subjective criteria in taking per-

sonnel actions. Indeed, in employment decisions regarding supervisory-level personnel in government as well as in private business, subjective factors inevitably play a major role. Where subjective judgment forms the basis of an employment decision, however, discriminatory motive, an essential element of the cause of action, is particularly difficult to unearth. In such instances safeguards designed to protect the integrity of the decision making process take on paramount significance.

It is precisely for this reason that § 544.2 of the Postal Service Personnel Handbook came into being. Through § 544.2 Congress and the Service have defined the "legitimate" procedure for subjective decision making. The court should enforce that congressional and administrative

judgment by refusing to consider the subjective judgment of an unlawfully constituted review committee as a legitimate reason for a personnel action. To do anything less is to eviscerate the protection provided by Title VII to those whose abilities and aspirations have led them to the higher levels of government service. Because the evidence established that the Service failed to comply with the Handbook, the court should recognize the compelling inference that impartiality, which Congress and the agency sought to assure, has been frustrated.

The allocation of burdens of proof and the order of presentation of evidence explained in McDonnell Douglas and clarified in Burdine were not designed to jettison regulations governing promotions. On the contrary, the analysis of proof pre-

be remanded with directions to grant Page appropriate relief.[18]

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18. The superseded panel opinion outlined the nature of the relief to which Page was entitled without "bumping" the successful applicants who were innocent of any complicity in the Postal Service's illegal designation of review committees. Page v. Bolger, No. 78-1792, slip op. at 17-21 (4th Cir. Dec. 19, 1979).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1792

Carl F. Page,

Appellant,

-v-

William J. Bolger,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, Judge.

Argued May 8, 1979

Decided December 19, 1979

Before WINTER, BUTZNER, and PHILLIPS, Circuit Judges.

Kenneth V. Farino (Farino, Oksman, Rick & Kincannon on brief) for appellant; Anthony W. DuComb, U. S. Postal Service, Labor Law Division and Eliot Norman, Assistant United States Attorney (William B. Cummings, United States Attorney on brief) for appellee.

BUTZNER, Circuit Judge:

Carl F. Page, a black employee of the Richmond, Virginia, Post Office, appeals from orders of the district court dismissing his individual action against the Postmaster General and denying him leave to amend his complaint to assert a class action. Page claims that because of his race he was denied promotion twice in violation of § 717 of the Civil Rights Act of 1964, as amended by § 11 of the Equal Employment Opportunity Act of 1972,[1] which proscribes discrimination in federal employment. Page's principal complaint is that the committees of postal service employees which reviewed the applicants' qualifications were racially constituted

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1. 42 U.S.C. § 2000e-16.

in violation of a pertinent regulation. We reverse the judgment of dismissal and affirm the denial of permission to amend.

I

The relevant historical facts are not in dispute. Page was a foreman in the mails section of the Richmond Post Office. In January 1976 he was one of several applicants for general foreman of mails, a supervisory position designated as postal executive salary level 17 (PES-17). The Postal Services' Personnel Handbook[2] provides that a review committee shall be designated to screen the applicants and recommend the "most outstanding candidates" to the appointing officer, who in this case was the postmaster.[3]

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2. Postal Service, Personnel Handbook P-11, TL-4 (Dec. 31, 1975).

3. Id. § 544.3-1.

The committee must consist of at least three members who are to be representatives of the district office, the installation with a vacancy, and the sectional center.[4] Section 544.2 of the Handbook states:

> Review committee members must be at an organizational or grade level equal to or higher than that of the vacant position. The official who designates a review committee is responsible for making every effort to select at least one woman and/or one minority group member. In the absence of available women and/or minority employees at the appropriate level, committee members must be furnished by the next-higher organizational unit, where available.

The district manager appointed a review committee of three white males to consider the applicants for the PES-17 position. The committee found that Page was qualified, but it determined that two

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4. Id. § 544.1-2.

white males were better qualified. All three applicants were recommended to the postmaster, who selected the top-ranked white male.[5] The appointee had been administratively detailed to the position temporarily. Page protested this appointment and filed a complaint with the Equal Employment Opportunity office.

In August 1976 Page sought promotion to postal operations specialist (PES-18). Again the district manager appointed three white males to the review committee. During Page's interview one of the committee members questioned him about his EEO complaint regarding the PES-17

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5. The postmaster testified that it was his practice to appoint the applicant whom the committee had ranked first, although §§ 545.1 and 545.2 of the Handbook do not require him to accept the recommendations.

position. The committee found that Page was qualified for the position, but it named one white male as better qualified. It ranked another white male as third. The postmaster selected the top-ranking white male. Again Page protested and filed an EEO complaint. The district manager voided the action of the review committee because of the interrogation about Page's EEO complaint with respect to the PES-17 position. He directed that a new committee be selected and that one of its members be a black employee.

In February 1977 the new committee met to reconsider the PES-18 appointment. A black employee from Philadelphia had been named to the committee, but when the committee met, his assignment to a new job prevented him from serving. A white

male was substituted. This committee, consisting of three white males, found Page to be qualified for the position, but it concluded that two white males, including the applicant previously ranked third, were better qualified. The top-ranking applicant was the employee who had been recommended in 1976. He had been detailed administratively to the position pending reconsideration by the new review committee. The postmaster accepted the recommendation of the new committee and appointed the incumbent. Page protested and filed another EEO complaint.[6]

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6. The appeals examiner who conducted the administrative hearing for Page's EEO complaint summarized the qualifications of Page and the appointee to the PES-18 position as follows:

After exhausting his administrative remedies with respect to both the PES-17 and 18 appointments, Page filed this action.

II

The district court conducted a de novo hearing in accordance with Chandler v. Roudebush, 425 U.S. 840 (1976). The

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6. continued

Page

Performance Evaluation:

3 "very high"

Education:

3 1/2 years College

12 PS Training Courses

Length of Service:

12 years

Supporting Comments:

Highly positive

government conceded, and the district court found, that Page had established a prima facie case in conformity with the principles stated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The district court concluded, however, that the government had rebutted Page's prima facie case.

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6. continued

Appointee

Performance Evaluation:

All "exceptionally high"

(Appointee has better evaulation)

Education:

1 1/2 years College

8 PS Training Courses

Length of Service:

16 Years

Supporting Comments:

Highly positive

It based its conclusion on two factors: (1) testimony by the committee members, which the court credited, that they did not discriminate against Page because of his race, and (2) the committee had legitimate nondiscriminatory reasons for ranking the white applicants above Page.

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6. continued

The examinder added the following comment:

> This comparison shows that [Page] has more formal education than the [appointee] and slightly more supervisory experience than [appointee]. On the other hand, the [appointee] has a higher performance evaluation (although both evaluations are close to outstanding in nature) and greater length of service than [Page]. Both employees appear to be highly qualified for the position; therefore, the examiner does not believe it is clear, from this comparison, that [Page] is better qualified than the [appointee] for the position in question.

The district court found there was no black employee in the Richmond Post Office who qualified to serve on the PES-17 review committee and that there was no reasonable replacement for the black employee on the PES-18 committee. The court summarized its conclusions on this issue as follows:

> Though neither the first nor second Review Committee contained a minority member, "every effort" was made to obtain one for the second meeting. This lack of a minority member must be weighed against the proper questions asked the applicants, the obvious concern by the Committee members for

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6. continued

The examiner also observed "that the selection process was highly subjective," and suggested improvements to reduce "the great margin of subjective inconsistency among the panel members' evaluation of the candidates." In re Complaint of Carl F. Page, Dec. No. PH071380132.

the applicant's ability to do the job, and the lack of bias on the part of the Committee members. Further, no law requires that there be any particular racial composition in Review Committees.

III

The district court and the parties agree that the principles expressed in McDonnell Douglas furnish the appropriate method for analyzing this case. The district court's ruling that Page had established a prima facie case required the government to "articulate some legitimate, nondiscriminatory reason" for Page's rejection. McDonnell Douglas, 411 U.S. at 802; Board of Trustees v. Sweeney, 439 U. S. 24, 24 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567, 576-78 (1978).

The government insists that it has rebutted Page's prima facie case by show-

ing that the PES-17 and 18 review committees found that Page had a "relative lack of qualifications" in comparison to the appointees. See Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977). Page counters the government's claim by contending that the review committees were racially constituted in violation of § 544.2 of the Handbook. To this argument the government responds that the Handbook is not a mandatory regulation. It asserts that the Handbook simply recommends that a committee should have a minority member. The government adds that in any event the district manager complied with the Handbook when he designated the review committees. We will next address these critical issues.

IV

Section 717 of Title VII as amended in 1972[7] provides in subsection (a) that "[a]ll personnel actions affecting employees . . . in the United States Postal Service . . . shall be made free from any discrimination based on race . . . ." Subsection (b) authorizes the Civil Service Commission to enforce the provision of subsection (a) and directs the Commission to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." The statute also provides that "[t]he head of each department, agency, or unit shall comply with such rules, regulations, orders, and instructions . . . ."

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7. 42 U.S.C. § 2000e-16.

In compliance with the mandate of § 717, the Civil Service Commission promulgated regulations[8] in 1972 which require the head of each government agency, including the Postal Service, to establish, maintain, and carry out "a continuing affirmative program designed to promote equal opportunity in every aspect of agency personnel policy and practice in the . . . advancement . . . of employees."[9] A specific directive of the regulations provides that the agency shall "[c]onduct a continuing campaign to eradicate every form of prejudice or discrimination based upon race, color, reli-

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8. These regulations have been codified in 5 C.F.R. §§ 713.201 to 713.643 (1978).

9. 5 C.F.R. § 713.203.

gion, sex, or national origin, from the agency's personnel policies and practices and working conditions . . . ."[10] Further the agency must "[d]evelop the plans, procedures, and regulations necessary to carry out its program of [equal opportunity]."[11]

The regulations of the Postal Service include "[t]he Headquarters Manuel, Regional Instructions, handbooks, delegations of authority, and other regulatory issuances and directives of the Postal Service or the former Post Office Department."[12] Consequently, the Postal Service's

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10. 5 C.F.R. § 713.203(b)

11. 5 C.F.R. § 713.204.

12. 39 C.F.R. § 211.2(a).

Personnel Handbook is a part of the Service's regulations. The edition applicable to these proceedings was issued as Publication 194, entitled Guide to Promotion and Reassignment, in May 1975.[13] The Guide's release was announced in Postal Bulletin 21038 which states that it will govern "all promotions and reassignments to covered positions . . . ." A memorandum from the Eastern Regional Postmaster General dated June 6, 1975, directed every manager to follow it in filling PES positions. The memorandum

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13. Section 544.2 of the Handbook is designated as ¶ C(4) of the Guide. A Postal Service employee testified that the Guide was initially issued in 1973. He added that prior to its issuance there had been "many accusations of favortism in the selection of people for promotion."

offered "any assistance needed for implementing this vital program affecting our employees." The Guide was incorporated in the Personnel Handbook §§ 540 to 553 on December 31, 1975.

In United States v. Caceres, 99 S.Ct. 1465, 1470 (1979), which dealt with the application of the exclusionary rule to evidence obtained in violation of an agency regulation, the Court said, "A court's duty to enforce an agency regulation is most evident when compliance with the regulation is mandated by the Constitution or federal law." This principle is applicable to Page's claim. The equal protection component of the fifth amendment's due process clause bars federal agencies from discriminating against their employees because of race. Congress implemented this constitutional provision by

enacting the Equal Opportunity Act of 1972.[14] The lineage of the Handbook can be traced from § 717 of this Act,[15] through the Civil Service regulations,[16] and the Postal Service's regulations.[17] Thus, it is apparent that § 544.2 of the Handbook, pertaining to the racial composition of review committees, was promulgated to enforce the fifth amendment and § 717 of Title VII. Therefore, in accordance with Caceres, we conclude that § 544.2 of the Handbook is mandatory, and

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14. Pub. L. No. 92-261, 86 Stat. 103 (March 24, 1972), 42 U.S.C. § 2000e et seq. (1972).

15. 42 U.S.C. § 2000e-16. See text at n.8, supra.

16. 5 C.F.R. §§ 713.203 and 713.204. See text at nn.9-12, supra.

17. 39 C.F.R. § 211.2(a)(3). See text at n.13, supra.

it was the duty of the court to enforce this provision.

V

We also conclude that the government did not comply with § 544.2. Although this section does not require every review committee to have a minority member, it places on the official designating the committee the responsibility of making "every effort" to select such a member. Moreover, in the absence of a qualified minority employee at the local level, "members must be furnished by the next-higher organizational unit, where available."[18]

Drawing on principles explained in Furnco Construction Co. v. Waters, 438 U.S. 567, 575-78 (1978), we believe that

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18. See text at n.5, supra.

"a sensible, orderly way to evaluate the evidence,"[19] on this issue is as follows: (1) When a qualified minority employee proves that a review committee was composed only of white males, (2) the government must articulate some legitimate, nondiscriminatory explanation for the absence of a minority member--that is, despite reasonable efforts to secure such a member, none was available. (3) The burden then shifts to the employee to establish that the "proffered justification is merely a pretext for discrimination." 438 U.S. at 578. To

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19. The Court pointed out that the allocation of the burden of proof was never intended to be "rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." 438 U.S. at 577. Although Furnco and its antecendent, McDonnell Douglas, dealt with a

carry his burden, the employee must prove discriminatory motive which can be established by either direct or circumstantial evidence as well as by inference. Teamsters, 431 U.S. at 335 n.15; McDonnell Douglas, 411 U.S. at 804-05.

A

With regard to the PES-17 committee, the district court found that at the local level there was no black employee of sufficient rank qualified to serve. Page asserts that this finding should be set

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19. continued

different factual issue, we believe their method of analysis, modified to reflect the facts, is appropriate here. See Furnco, 438 U.S. at 575-76. "Presumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities and to conform with a party's superior access to the proof." Teamsters v. United States, 431 U.S. 324, 358 and 359 n.45 (1977).

aside because the postmaster testified that he would have furnished a black station master had he been asked to do so. We reject Page's argument because the government presented testimony that station masters, although of sufficient rank, lack the necessary experience. Page did not show that this explanation was a pretext. Applying the analysis adopted from Furnco, we accept the district court's finding.

The designating officer's duty, however, was not discharged by simply canvassing the local level. Section 544.2 obliged him to secure a minority member from the next higher organizational unit, where available. The record does not disclose, and the government does not contend, that any effort was made to obtain a black employee from the next

higher level. Since the government has articulated no reasonable explanation for the absence of a minority member from a next higher organizational unit, it is apparent that it has not satisfied step 2 of the modified Furnco analysis. We conclude that the Postal Service did not comply with § 544.2 when the PES-17 committee was named.

B

The district court's findings and conclusions concerning the composition of the second PES-18 are based largely on the administrative hearing transcript and the decision of the appeals examiner which were made a part of the record of this civil action. The administrative record discloses that a black employee from Richmond and another from Norfolk were qualified to serve on review committees.

The government offered an explanation for the absence of the Richmond employee, which Page did not show was a pretext. The government satisfied the modified Furnco analysis, and we find no failure to comply with § 544.2 because the Richmond employee was not designated to serve on the committee.

The examiner noted that neither Page nor the government had offered evidence to show the availability of the Norfolk employee, who also was from the local level. The examiner ruled against Page on this point. This ruling was erroneous. It is undisputed that the PES-18 committee was composed of white males. Consequently, the burden was on the government, not Page, to articulate some legitimate explanation why the Norfolk employee had not been selected.

Furthermore, when the black employee from the Eastern Regional Office became unable to serve on the PES-18 committee, a white employee was substituted. At the administrative hearing, the government offered no explanation for the substitution of a white employee when the designating officer specifically had requested a black employee in order to comply with § 544.2. There is no suggestion in the administrative record that another black employee from the Regional Office was not available. The examiner's ruling against Page on this point was erroneous. The substitution of a white employee for the black committee member, absent some reasonable explanation for the change in the racial composition of the committee, does not satisfy step 2 of the modified Furnco analysis. At the de novo

hearing, the government did not supplement the record to remedy the deficiencies of its position at the PES-18 administrative hearing. Therefore, we conclude that the district court's reliance on the administrative record and decision was misplaced.

C

The government did not comply with § 544.2. The review committees, which weighed the relevant qualifications of Page and the successful appointees for the PES-17 and 18 positions, were constituted improperly with respect to race. The government's response to Page's prima facie case rested on the premise that properly constituted review committees found the appointees to be better qualified. Since the government failed

to articulate some legitimate, non-discriminatory explanation for the absence of minority members on the review committees, its premise lacks a factual basis and Page must prevail. He has carried the ultimate burden of persuasion by showing that he was denied promotion by committees that were racially constituted in violation of § 544.2 of the Handbook.

As previously stated, Page must show a discriminatory motive, but he need not prove by direct evidence that the individual members of the committees were subjectively biased. The Postal Service officials, who are responsible for personnel policies, decided when they promulgated § 544.2 that in order to dispel partiality on the basis of race,

the designating officer of promotion review committees must make "every effort" to seat a minority member. When evidence establishes a lack of compliance with § 544.2, one can draw the inference that impartiality, which the Handbook sought to assure, was frustrated.[20] See Furnco, 438 U.S. at 577-78.

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20. The government conceded and the district court held that Page met the requirements set forth in McDonnell Douglas for proof of a prima facie case. In the context of this case, however, the McDonnell Douglas analysis presents problems, particularly with the fourth element of proof. 411 U.S. at 802. With the benefit of hindsight, we suggest the issues could have been simplified by adopting the following analysis. To establish a prima facie case, the employee must prove (1) he belonged to a minority, (2) he qualified for the job, and (3) he was denied promotion because of an evaluation by a review committee consisting of only white males. Then, the government must articulate some legitimate nondiscriminatory explanation for the

VI

For guidance in fashioning a remedy, we turn to the Court's explanation of principles in Teamsters, 431 U.S. at 364-65:

> Analysis of this problem must begin with the premise that the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act. Albemarle Paper Co. v.

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20. continued

absence of a minority member--that is, despite reasonable efforts to secure such a member, none was available. In this event, in order to prove his case, the employee would have to establish that the "pro- offered justification is merely a pretext for discrimination." See Furnco, 438 U.S. at 578. We do not suggest that this analysis would be appropriate in the absence of a regulation similar to § 544.2 of the Personnel Handbook.

Moody, 422 U.S. at 417. In Griggs v. Duke Power Co., and again in Albemarle, the Court noted that a primary objective of Title VII is prophylactic: to achieve equal employment opportunity and to remove the barriers that have operated to favor white male employees over other employees. 401 U. S. at 429-430; 422 U.S. at 417. The prospect of retroactive relief for victims of discrimination serves this purpose by providing the "'spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges'" of their discriminatory practices. Id., at 417-18. An equally important purpose of the Act is "to make persons whole for injuries suffered on account of unlawful employment discrimination." Id., at 418. In determining the specific remedies to be afforded, a district court is "to fashion such relief as the particular circumstances of a case may require to effect restitution." Franks, 424 U.S., at 764.

Thus, the Court has held that the purpose of Congress in vesting broad equitable powers in Title VII courts was "to

> make possible the 'fashion-[ing] [of] the most complete relief possible,'" and that the district courts have "'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" Albemarle, supra, at 421, 418.

Although the court dealt with a private employer in Teamsters, we believe the principles it set forth are applicable to public employment. Indeed, Title VII as amended by § 717 specifically includes back pay as a remedy.[21]

Page seeks back pay, promotion, and an order vacating the position of postal operations specialist, PES-18, for which he applied.

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21. 42 U.S.C. § 2000e-16(b) and (c).

We deny Page's request that the PES-18 position be vacated and that he be promoted. This would require the demotion of the qualified incumbent who, though the beneficiary of discrimination against Page, was innocent of any wrongdoing. In Shortt v. County of Arlington, Virginia, 589 F.2d 779, 782 (4th Cir. 1978), and Patterson v. American Tobacco Co., 535 F.2d 257, 267-69 (4th Cir. 1976), we held that such relief was not appropriate.

In accordance with the dual purposes of Title VII which are reiterated in Teamsters, 431 U.S., at 364-65, Page is entitled to back pay. The federal government, no less than private employers, should be subjected to the "spur" of retroactive relief to "eliminate, so far as possible, the last vestiges of [its]

discriminatory practices." Similarly, the federal government should be required to "make persons whole for injuries suffered on account of unlawful employment discrimination." With regard to the PES-17 position, we conclude that Page is entitled to back pay at the PES-17 rate from January 3, 1976, the date the vacancy was filled, until the PES-18 position was filled permanently.[22] With regard to the PES-18 position, Page is entitled to back pay at the PES-18 rate from the date this vacancy was filled until the award terminates as we explain below.

Page is not entitled to PES-18 pay in perpetuity or to automatic promotion to

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22. The record indicates that this vacancy was filled in February or March, 1977, but the date is not disclosed.

the next vacancy in the postal operations specialist position. When a vacancy occurs in this position at Richmond, if Page does not apply his back pay award will terminate. If Page is successful, the need for his award will be eliminated. If Page is unsuccesful because a better qualified applicant is chosen through a process that is not racially tainted, Page's back pay award will terminate. The Postal Service can promote the best applicant, regardless of race, provided discrimination plays no role in his selection.

VII

Page also complains that the district court erred by refusing him leave to amend his complaint to allege a class action. By his motion to amend, he sought to fill the hiatus caused by denial of class

certification in another pending action complaining about white review committees and subjective promotion criteria. The district court, citing the imminence of Page's trial, which was scheduled for the next month, and the completion of discovery, denied Page's motion to amend and his accompanying request for a continuance. We find no abuse of discretion in the ruling of the district court.

This case is remanded for the entry of a decree consistent with this opinion. Since Page has substantially prevailed, he should be allowed a reasonable attorney's fee,[23] in an amount to be determined by the district court, and his costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

23. 42 U.S.C. §§ 2000e-5(k) and 2000e-16(d). See Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977).

PHILLIPS, Circuit Judge, concurring and dissenting:

I concur in Part VII of the court's opinion holding that class action amendment was properly denied by the district court.

Unable, with all respect, to agree with the majority's conclusion that a violation of Title VII was established on the evidence before the district court and that the district court erred in its findings and conclusions to the contrary, I dissent from that portion of the court's opinion. My disagreement goes to fundamental concerns about the proper application by this reviewing court of the disparate treatment theory of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) to the evidence in this case.

The proof scheme devised by the Supreme Court to provide a "sensible, orderly

way to evaluate the evidence" of alleged disparate treatment violations of Title VII, Furnco Construction Co. v. Waters, 438 U.S. 567, 577 (1978) is now familiar and need not be repeated here.[1/] Both parties and both courts that have considered this case have completely agreed throughout that disparate treatment theory provides the controlling substantive and procedural framework for assessing proof of plaintiff's claim of violation. Additionally, everyone involved is apparently agreed that under it the plaintiff's evidence established a prima facie case of violation, i.e., raised an inference of discriminatory intent on the defendant's part. Disagreement arises

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[1] See Part III, majority opinion.

therefore in respect of subsequent stages in that proof scheme, and these trace finally to disagreement over the identify of the "personnel actions" which in contemplation of § 717 of Title VII are properly considered the appropriate focus of inquiry in this case.

In the district court, as seems plain from the record, the court and both parties were agreed that the "actions" in ultimate issue were the personnel decisions denying to plaintiff and giving to others the employment positions that each sought and only one could be given. Clearly these were the ultimate personnel actions to which it was thought plaintiff's prima facie showing of discriminatory motive was properly addressed and weighed. It was clearly these decisions for which a "legitimate, nondiscriminatory reason"

was sought in defendant's rebutting evidence. Finally, it was these decisions whose nondiscriminatory quality was considered in issue for purposes of assessing the possible "pretextual" nature of the reasons given for them by defendant.

When the district court assessed the evidence on this basis - a basis, I repeat, which was apparently accepted by both parties as the appropriate framework for analysis - it found: 1) plaintiff's prima facie case established; 2) the inference of discriminatory intent thereby created effectively dispelled by defendant's articulation of a "legitimate, nondiscriminatory reason," i.e., relative lack of qualification; and 3) this reason not shown to be a mere pretextual cover for discriminatory intent behind the decision.

In my judgment, in the process just summarized the district court adhered faithfully to the mode of proof analysis controlling in this type case, and to the issues as framed by the pleadings and proof. Bearing in mind that under the theory advanced by plaintiff the burden of persuasion was finally upon him to prove that he was "treated less favorably than others because of [his] race," Teamsters v. United States, 431 U.S. 324, 335-36 & n.15 (1977), in respect of specific "personnel actions," 42 U.S.C. § 2000e-16(a), I simply cannot conclude that the district court's findings and conclusions were clearly erroneous in fact or erroneous in law. Accordingly, in what I would consider a rather clear cut adherence to our appellate role, I would affirm the district court's judgment.

The majority concludes differently. As indicated, our difference can be traced to initial disagreement over the proper focus of inquiry into the discrimination charged, over the "personnel actions" whose motivation is properly treated as ultimately in issue. The majority finds these not in the ultimate decisions to award the job positions to others than plaintiff, but in the mediate decisions by which the review committees that were to make recommendations in respect of the ultimate decisions were constituted.[2/]

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[2] This is nowhere explicitly announced in the majority opinion but it seems to me the unmistakable result of the analysis adopted in Part V of that opinion. See also ___ F.2d at ___ n.20, slip op. at 17 n.20. While the analysis used is characterized by the majority as a mere adaptation or modification of the McDonnell Doulgas/Furnco proof scheme to fit the special facts of the case, I can only read it as a complete substantive shift of focus

Aside from the fact that this in effect introduces on appeal a new and dispositive

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2 (continued)

from the appropriate object of the disparate treatment inquiry. That this is the consequence actually intended by the majority opinion seems indicated by its assertion that in this Title VII action, it is "the duty of the court to enforce this provision [for constituting the review committees]." ___ F.2d at ___, slip op. at 12.

While I concede the importance of finding appropriate sanctions for enforcing affirmative action guidelines having the force of law lest they become empty shells, I do not believe that Title VII can fairly be read to provide the sanction by transmitting affirmative action guideline violations into Title VII violations. Surely the judicial process is capable of devising forms of prospective relief aimed directly at threatened or ongoing violations of such regulations. And of course in the Title VII action itself past guideline violations casually related to the denial of employment opportunities may rightly provide powerful and sometimes decisive evidence of discriminatory motive for the ultimate decisions, thus establishing the latter as violations. These, it seems to me, are the appropriate and adequate sanctions.

theory that was not advanced or considered on trial,[3/] I am persuaded, with the greatest deference to my brothers in the majority, that its adoption constitutes an erroneous departure from settled, and fundamental principles of disparate treatment doctrine under Title VII.

That the proper substantive focus of inquiry in cases charging disparate treatment under Title VII has always been considered to be an ultimate act directly denying an employment benefit to or imposing an employment burden upon a claimant rather than any mediate acts leading to the ultimate act is manifest in the major Supreme Court decisions

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[3] ___ F.2d at ___ n.20, slip op. at 17 n. 20.

establishing and refining the theory.[4/] To take as the focus of inquiry a mediate act, such as the constitution of a review committee, does more than simply upset a legally tidy proof scheme; it effectively changes what I would consider essential substantive underpinnings of the disparate treatment claim.

The instant case is a perfect illustration. Under the proof scheme as applied by the district court, with denial of the

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[4] E.g., Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24-25 & nn.1 & 2 (197^) (failure to promote); Furnco Constr. Co. v. Waters, 438 U.S. 567, 576-77 & n.8 (1978) (failure to hire); McDonnell Douglas Corp. v. Green, 411 U. S. 792, 802 (1973)(same). See also B. Schlei & P. Grossman, Employment Discrimination Law 15 (1976).

employment position taken as the focus of inquiry, the composition of the review committee is significant, perhaps highly so, but only as it relates to the pretextual nature of the reason given for the final action, and on this plaintiff has the burden of proof. Under the proof scheme as applied by the majority, with composition of the review committee itself the focus of inquiry, the defendant must come forward with evidence of a legitimate nondiscriminatory reason for the all-white composition of the committee. The opposite results achieved in the district court and in this court trace directly to their opposite casts of proof burdens on this critical issue, as they always will where, as here, the evidence on the disputed matter is lacking or generally inconclusive.

The majority finds this justified on the basis that the mediate action here is one as to which the defendant was under a separate legal obligation imposed precisely to insure achievement of affirmative action goals.[5/] While it must be conceded that if this be taken as a requirement for application of the proof scheme adopted by the majority it would considerably limit practical applications of this theory,[6/] there seems to me a very

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[5] Indeed this is apparently accepted as an absolute requirement for application of the theory adopted in the majority opinion. See ___ F.2d at ___ n.20, slip op. at 17 n.20.

[6] Though I do not see how in logic the theory can fairly be confined to federal employment. State agency guidelines having the force of administrative regulations under state law would seem indistinguishable. Private employer affirmative action guidelines, though without force of law, would seem equally derivable in ultimate terms from Title VII,

simple reason why this is not acceptable doctrine no matter how narrow its range of practical application. Title VII is not aimed at policing violations of affirmative action programs, whether undertaken completely voluntarily or under the compulsion of executive or administrative orders, but at preventing and redressing violations of individual rights not to be discriminated against in the making of ultimate personnel decisions - to hire, to fire, to promote, to grant leave, etc.

In precedential terms, the unmistakable thrust of the court's decision is to make any violation of an affirmative action

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6 (continued)

if adopted in response to federal Executive Order. See Part IV, majority opinion; cf. United Steelworkers v. Weber, ___ U.S. ___, 99 S. Ct. 2721 (1979).

guideline that is arguably related to an unfavorable ultimate personnel action a violation of Title VII.[7/] By this means voluntary affirmative action undertakings come in practical terms to define the standards for compliance with Title VII.

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[7] I say "thrust" advisedly, to suggest a tendency rather than a certain consequence. I realize that the majority opinion does not make every guideline violation a per se Title VII violation; that the employer can theoretically justify the guideline violation itself as being based upon a "legitimate, nondiscriminatory reason." The practical effect that I foresee is nonetheless generally to equate violation of guideline with violation of Title VII. This case well illustrates why.

The range of covered employment decisions - of "personnel actions" - contemplated by the internal definitions of Title VII, is extended to include voluntary employer undertakings to eradicate existing patterns of discrimination in employment. While we must be careful in our unprofessional forays into social psychology, the likely effects of this on bold affirmative action programs in public (and perhaps private) employment seem to me safely predictable.

At a time when Weber[8/] has freed employers from undue risks of "reverse

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[8] United Steelworkers v. Weber, ___ U.S. ___, 99 S. Ct. 2721 (1979). That the Weber principle should be applied as well to government employment is indicated in Detroit Police Officers Ass'n v. Young, ___ F.2d ___, 48 U.S.L.W. 2277 (6th Cir. 1979).

discrimination" suits as they undertake to do more than Title VII requires of its own force, it would be ironic indeed to expose them now to heightened risks from "direct discrimination" suits for taking the same actions. In the long haul, it may prove wise as a matter of social dynamics, hence national policy, to preserve a zone of private ordering between what employers must do to comply with national laws forbidding discrimination in employment, and what they may legally do to speed eradication of inherited or historically based patterns. The law, with a major push from Weber has moved that way lately. If my analysis is correct, our decision in this case tends to close that zone and to commit us unduly

to sole reliance on the legal order in this realm.[9]

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[9] Of course I do not mean to suggest that the existing floor of legal compulsion should be lowered. History has conclusively demonstrated that only law's compulsion suffices to move things significantly in this realm - at least in our present condition. My concern is with discouragement of voluntary efforts to raise the ceiling of endeavor.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

CARL F. PAGE	:	
	:	
v.	:	CIVIL ACTION
	:	NO: 77-0400-R
WILLIAM J. BOLGER	:	

O R D E R

In accordance with the memorandum filed herewith, it is ORDERED that judgment be rendered for the defendant.

Let the Clerk send copies of this order and the memorandum to all counsel of record.

D. Dortch Warriner
United States District Judge

Date: 16 August 1978

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

CARL F. PAGE	:	
	:	
v.	:	CIVIL ACTION
	:	NO: 77-0400-R
WILLIAM J. BOLGER	:	

MEMORANDUM

Carl F. Page, a black Postal Service employee, was considered for two job openings in 1975 and 1976 but in each case a white employee was promoted instead. After unsuccessful pursuit of administrative remedies, Mr. Page filed suit with this Court on 18 July 1977 seeking injunctive relief from the employment practices of the U.S. Postal Service which allegedly violated plaintiff's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq, as amended by the

Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16. Jurisdiction is properly invoked pursuant to 28 U.S.C. § 2000e-5(f) 3 and § 2000e-16(c). The Court finds the facts as stipulated in the order in pretrial conference entered on 12 May 1978.

The Court also finds that in light of the duties inherent in any supervisory position, promotion to such a job cannot be decided solely by objective measures. Thus, the Postal Service relies only partially on objective guidelines in promotion to supervisory positions. However, supervisors are given written guidelines and instructions defining the subjective criteria to be used in evaluating candidates for these positions.

The plaintiff alleges two incidents of racial discrimination in employment:

One relating to promotion to the position of General Foreman of Mails, PES-17, and one relating to the position of Postal Operation Specialist, Sr., PES-18. First, the Court will find the material facts that have not been stipulated by the parties concerning the PES-17 position.

I

In regard to the PES-17 opening, plaintiff complains that the Review Committee had no minority member, that no personal interviews were held, that C.G. Campbell, Jr., the white man selected for the opening, had been selected for a training school by George N. Trexler, one of the Review Committee members, that Mr. Trexler, had previously shown bias against blacks, that the cover sheet listing the candidates had Mr. Campbell designated as holding a higher position

than he actually held, and that the plaintiff had more supervisory experience than the white selected.

The District Review Committee which recommended candidates for promotion to the PES-17 position consisted of white males only. But the one black in mail processing who was in a high enough position to sit on the Review Committee, Lawrence C. Rainey, could not sit on this Review Committee because he had nominated Mr. Page for the vacancy. There were black station chiefs who could have sat on the Committee but the Court finds the Postal Service practice of putting people on the Committee from the department in which the vacancy occurs, in this case mail processing, to be a reasonable practice aimed at achieving a Committee which is familiar with the duties of the post

to be filled. The Postal Service's written guidelines provide that the official who designates the Review Committee is responsible for making "every effort" to select at least one woman and/or minority group member for the Committee and if none is available at the appropriate level, the Guidelines require the next higher organizational unit to furnish such members. But due to the facts of this case no inference of discrimination can be made from the lack of a minority group member on the Committee.

It is also true that there were no personal interviews conducted regarding the PES-17 position. But racial motivation cannot be inferred from the absence of interviews during the selection process. According to the Regional Guidelines, interviews for PES-22 and below positions

are not mandatory and none were held because one of the Committee members, John Francis Kettner, was quite familiar with the candidates and because the Personal History Form 991 and the Estimate of Potential Form 2577 of the candidates adequately reflected their qualifications and background. It is true that the Guidelines state that selecting officials should interview the best qualified nominees but it has not been the consistent practice of the Richmond post office to do so. Further, there is no evidence that blacks perform better than whites on personal interview, therefore, the omission of the interview has no racial significance.

Mr. Page and Mr. C. G. Campbell, Jr. were treated similarly in regard to opportunities for shcooling and advancement.

Mr. Page was sent to a Mail Processing Manager's Action Series training course in Philadelphia while Mr. Campbell was sent to a Management Action Series course in Bethesda, Maryland. Both Mr. Page and Mr. Campbell had been detailed to Acting General Foremen, PES-17 positions. Mr. Campbell's participation in the MAS Course was not a significant factor in his being rated higher than Mr. Page on the list of the top three candidates submitted to the Richmond postmaster by the Review Committee. Further, it was not Mr. Trexler who had selected Mr. Campbell for the training course.

Mr. Trexler had previously detailed one Carl Lauhorne, a white, instead of Lawrence C. Rainey, a black, to Tour 1 Superintendent. This led Jack West, a Postal Official in Philadelphia who had

not interviewed anyone involved in the matter and who made no findings of fact, to write a recommended decision letter of 3 September 1976 stating that "record evidence shows you (Lawrence Rainey) were shown disparate treatment because of your race." But Mr. Trexler has not been shown other than by Mr. West's letter to have discriminated against anyone on the basis of race. And there is no evidence that Mr. Trexler or anyone else on the Review Committee declined to recommend Mr. Page as the best qualified candidate in retaliation for Mr. Rainey's having filed a charge of discrimination.

The members of the Review Committee who considered applications for promotion to the PES-17 vacancy had complete information on the relative qualifications and experience of the leading three candidates

through the Form 991 (Personal History) and Form 2577 (Estimate of Potential) used by the Postal Service. Thus, Mr. Campbell was not given any edge in the ranking process because the cover sheet listing the candidates showed Mr. Campbell to be an acting PES-17 and Mr. Page a PMS-15. This mistake as to Mr. Campbell's rating was due to an error by the typist, who was not racially motivated at all.

The Review Committee, with all the information at its disposal, could properly conclude that Mr. Page did not have more supervisory experience than Mr. Campbell and that Mr. Page was not better qualified than Mr. Campbell or Mr. Harvey, the candidate rated second by the Committee, by a vote of 2 to 1.

II

The Court will not proceed to find facts that had not been stipulated by the parties in regard to promotion to the PES-18 position. Two review committees were held, the first in August 1976 and the second in February 1977, and personal interviews were held.

In regard to the PES-18 opening, the plaintiff has three complaints. He complains first of a remark made by a member of the first Review Committee concerning the plaintiff's EEO complaint. He next complains of the detailing of a white man to the vacant PES-18 position until the permanent replacement was chosen. Finally, he complains of the lack of a minority member on the Committees.

The first committee, consisting of Messrs. Tuohy, Walsh and Newcomb, spent

almost the entire day interviewing and reviewing the qualifications of the fourteen candidates, 5 black and 9 white. During his interview by the Committee, Mr. Page was asked about his knowledge of the job description of the position, his background in computers and mathematics, his ability to work with equipment manufacturers and the letter sorting machine layout. These proper questions were followed at the end of the interview by a question by Mr. Newcomb concerning Mr. Page's filing of an EEO Complaint with respect to the PES-17 vacancy. Prior to this remark, Mr. Newcomb had never said or done anything that would indicate he was attempting to turn the Committee against Mr. Page and after the Committee interview Mr. Newcomb tried to convince Mr. Page that he had meant no harm in asking him about the EEO complaint.

EEO proceedings in the Postal Service are not confidential but questioning about an EEO complaint is considered improper by the Postal Service. But this questioning did not constitute discrimination and had no effect on the Committee's ranking of the candidates. When the Committee voted on the candidates there was no discussion of the EEO complaint.

Mr. Walsh, one of the members of the August 1976 committee, and District Manager of Distribution in Norfolk, had not previously been aware of Mr. Page's EEO complaint and did not meet Mr. Page until the Committee's interview. In ranking the candidates, Mr. Walsh reviewed the candidates' forms and personnel files and gave weight to their experience in mail processing and their interest in the position. Mr. Walsh had worked as a

Postal Operations Specialist, Sr., and considered Mr. Dillon, a white, to be better qualified for that position than Mr. Page. Mr. Walsh did not recall hearing Mr. Newcomb ask Mr. Page about the filing of an EEO complaint and did not take race into account when choosing Mr. Dillon as the best qualified applicant for the vacancy.

Mr. Tuohy, also a member of the August 1975 review committee, was Virginia District Director of Mail Processing. He did not have any substantial contact with Mr. Page since Mr. Page was not working the daytime shift. Mr. Tuohy was well aware of the duties and responsibilities of the Postal Operations, Sr., position and in considering candidates for the position, he was concerned with experience, education, evaluation by

their supervisors, awards, and interview impressions, among other things. He summarized these factors on a rating sheet and it was on the basis of his review of these factors that he determined Mr. Dillon was the best qualified applicant for the opening.

Prior to the August 1976 Review Board, Mr. Tuohy had not been aware of Mr. Page's EEO complaint. He heard Mr. Newcomb ask Mr. Page about it but it did not affect his decision at all. His decision was based on the rating sheet, not on race or the EEO remark.

The third member of the Review Committee was Mr. Newcomb, Manager of Distribution in Richmond. He had known Mr. Page for 12 years and had supervised him when he was a PS Distribution Clerk and later. Mr. Newcomb considered the

candidates' qualifications as shown on the Forms 991 and 2577 and took into account their performance during their interviews. He did not discuss Mr. Page's previous EEO complaint with the other members of the Committee and did not take into consideration when he chose Mr. Dillon as the best qualified applicant for the vacancy. Mr. Newcomb did not take race into consideration in his decision and asked about the EEO complaint because of his personal interest in Mr. Page.

Each member of the August 1976 Review Committee independently arrived at the decision that Mr. Dillon was the best candidate for the PES-18 vacancy. The decision was unanimous. Mr. Dillon was detailed to the PES-18 position on 30 August 1976. The procedures used to detail Mr. Dillon were proper.

When Mr. Fleming, Virginia District Manager, learned that Mr. Newcomb had asked the question about Mr. Page's EEO complaint, he decided to void that Committee and convene a new Committee. The second Review Committee convened in February 1977. Mr. Page had requested that a minority member be placed on the Committee and the Postal Service attempted to comply. A black from the Regional Office in Philadelphia was scheduled to sit on the Committee but at the last minute he had to cancel. There was no reasonable replacement available and the absence of a black on the Committee was not racially based.

The second Review Committee asked Mr. Page specific questions about how he would handle the situation of moving operations to the State Fair Grounds,

and about bin set-ups. The questions were related to the job and its requirements.

The Committee consisted of Mr. Grossick from Philadelphia, Mr. Waters from Charlottesville and Mr. Saxby from Finance in Richmond. Mr. Page did not know Messrs. Grossick and Waters and though he knew Mr. Saxby he did not work in the same department with him.

The Committee chose Mr. Dillon as the best qualified applicant for the PES-18 position, Mr. Vaughan was chosen second and Mr. Page third. As to the candidates themselves, Mr. Page has never worked with Mr. Vaughan but he did report to Mr. Dillon when Mr. Page was detailed to the Quality Control Office during the Christmas rush. Mr. Page has no complaints about Mr. Dillon's work performance.

In order to settle Mr. Page's claim as to this second Review Committee, the Virginia District Manager, Mr. Fleming, offered to convene yet another Board with a minority member. Mr. Page declined.

District Manager Fleming followed the Regional Guidelines in appointing Postal officials to the first and second Review Committees and according to those Guidelines, Mr. Mizell, the Richmond Postmaster was required to select the Number One candidate recommended by the Review Committee unless he could provide written justification to the contrary. And since Mr. Newcomb's remark about the EEO complaint did not affect the decision of the first committee and in any event the actions of the second committee cleared up any irregularities of the earlier one, there was no reason for Mr. Mizell not to select

the Number One candidate of both committees, Mr. Dillon.

The first committee ranked Dillon first, Page second and Vaughan third. The second Committee ranked Dillon first, Vaughan second and Page third. The selection of Mr. Dillon by the first committee was unanimous.

CONCLUSIONS OF LAW

The substantive anti-discrimination law embraced by Title VII applies to the federal government following the passage of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16. Morton v. Mancari, 417 U.S. 535, 547 (1974).

Under these code provisions, a federal employee like Mr. Page enjoys the same right to a trial de novo of his employment discrimination claim as does an employee in private industry. Though

entitled to a de novo trial, where the administrative record includes findings of fact based upon hearings at which the complainant is represented by counsel and at which the Examiner was able to observe the credibility and demeanor of witnesses, such factual findings are to be given appropriate weight. Chandler v. Roudebush, 925 U.S. 840, 863 (1976); Hackley v. Roudebush, 520 F.2d 108, 150 (D.C. Cir. 1975).

The Court has before it findings of fact so derived in regard to the allegations of discrimination with respect to both positions. A hearing before an Examiner of the Federal Employee Appeals Authority was held 23 March 1977 and a finding that no racial discrimination occurred in regard to the PES-17 vacancy was entered. This finding was affirmed

on 18 August 1977 by the Manager, Equal Employment Opportunity Branch, Eastern Region of the Postal Service. On 13 October 1977 a hearing before another Examiner of the Federal Employee Appeals Authority was held in regard to the PES-18 promotion. The Examiner found no evidence of discrimination or reprisal. While the Court is charged with the duty of determining its own facts, which it has done, it would be foolish to ignore these findings entered by the Complaints Examiners, who have accrued some expertise in the area of discriminatory practices. Smith v. Universal Services, Inc., 454 F.2d 154, 157 (5th Cir. 1972).

The Court strongly affirms that Mr. Page, like all other persons pursuing Title VII remedies or otherwise protesting

discriminatory employment practices, are protected against retaliatory actions by their employers. Rosen v. Public Service Electric Co., 405 F.2d 775, 781 (3rd Cir. 1973).

The Court knows that proof of overt discrimination in employment is seldom direct, and in order to translate the legal principles of equal opportunity into reality, it is an error to limit the application of Title VII to overt specific acts of racial discrimination. Teamsters v. United States, 431 U.S. 424 (1977); Brown v. Gaston Co., Dyeing Machinery Co., 457 F.2d 1377 (4th Cir. 1972).

Subjective employment criteria are always suspect due to the ease with which they can mask unlawful bias but the use of

subjective criteria is not to be condemned per se as not all decisions can be made by objective standards alone. Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir. 1975). The Postal Service's PES procedures, by use of systematic posting of job vacancies, written promotion guidelines, written definition of factors to be used by supervisors in making recommendations, and consistent, written criteria for choosing among employees with substantially equal qualifications, appears to have sufficient reliability, job relevance and administrative safeguards to be a valid nondiscriminatory promotion system. Thus, the plaintiff needs to show that the system operated in a discriminatory manner in filling one of the job vacancies for which he applied.

As in other cases, the plaintiff in an employment discrimination case still has the burden of proving by an overall preponderance of the evidence that a violation of Title VII has occurred. Sperling v. United States, 515 F.2d 465, 481 (3rd Cir. 1975), cert. denied, 426 U.S. 919 (1976); Wilson v. Willowbrook, Inc., 433 F. Supp. 321, 322 (N.D. Tex. 1977). And this is an individual case in which the plaintiff has undertaken to show disparate treatment or a showing that the employer has treated him less favorably than others because of his race. Teamsters, supra at 335-336 and n. 15.

The general rules governing the order and allocation of proof in this case are set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800-802.

An individual Title VII plaintiff must carry the initial burden of proof by establishing a prima facie case of racial discrimination. This showing is made by the complainant when he demonstrates that his rejection did not result from the two most common legitimate reasons on which an employer might rely; an absolute or relative lack of qualifications or the absence of a vacancy. Teamsters, supra, at 358 n. 44. Mr. Page was clearly qualified for each opening and the vacancies obviously existed.

But the establishment of a prima facie case does not require a finding in favor of the plaintiff. It only permits such a finding. The risk of non-persuasion remains on the plaintiff, just as it remains on the defendant if he does not rebut the prima facie case. Roman

v. ESB, Inc., 550 F.2d 1343, 1350 (4th Cir. 1976).

Once the prima facie case is made out, the burden shifts to the employer to rebut it by offering a legitimate, nondiscriminatory reason for the complainants rejection. McDonnell, supra at 802. The defendant is not required to show that the decision was objectively correct as that is not an issue for the Court. Defendant is only required to show that the decision was not racially motivated. After all, the federal court is not the appropriate forum to review the multitudinous personnel decisions of public agencies. It is racial discrimination, not less than perfect judgment, which Congress will not let this Court tolerate. Bishop v. Wood, 426 U.S. 341, 349 (1976).

If the defendant successfully rebuts the defendant's prima facie case, the plaintiff must prove that the defendant's rationale is in fact a pretext or sham masking discrimination. Abrams v. Johnson, 534 F.2d 1226, 1231 (6th Cir. 1976). Then the Court must consider and weigh all the evidence before it bearing on the presence or absence of racial discrimination against the plaintiff. Roman, supra at 1350-1351.

In regard to both job vacancies the plaintiff has put forth a prima facie case. He was qualified for both positions and the vacancy existed.

A.

The plaintiff complained of the lack of a minority member on the Review Committee for the PES-17 position, the fact that no personal interviews were held, the fact

that the white selected for the position had been sent to a training school, the mistake on the cover sheet listing Mr. Campbell's position, Mr. Trexler's appointment to the Committee despite a previous finding of racial discrimination, and Mr. Campbell's lesser amount of supervisory experience. Not holding a personal interview was justified in view of the abundance of information the members of the Committee had on the applicants; the sending to school of the white selected is balanced, if "balance" be needed, by the plaintiff's also being sent to a similar course; the mistake on the cover sheet was not intentional and had no effect on the committee's decision; Mr. Trexler did not take race into account in the selection of Mr. Campbell instead of Mr. Page; and Mr. Page

did not have greater supervisory experience than Mr. Campbell. Thus, in regard to the PES-17 position, the lack of a minority on the committee is the only substantial complaint of the plaintiff shown by the evidence. This is greatly outweighed by the defendant's obviously fair and painstaking efforts to promote the most qualified applicant out of a number of at least somewhat qualified nominees.

In conclusion, race did not play a part in the selection process for the PES-17 vacancy. Legitimate, nondiscriminatory reasons for the Committee's ranking and decision have been established by the facts. Plaintiff's evidence does not show that these reasons are but a pretext or sham masking a racial motive in the selection of the candidates.

B.

In regard to the PES-18 vacancy, the remark about the EEO complaint by Mr. Newcomb did not influence the first Review Committee's decision and even if it had, the decision to convene another Review Committee remedied any problem with it. The detailing of Mr. Dillon, the successful white applicant for the position, on a temporary basis was done properly. Though neither the first nor second Review Committee contained a minority member, "every effort" was made to obtain one for the second meeting. This lack of a minority member must be weighed against the proper questions asked the applicants, the obvious concern by the Committee members for the applicant's ability to do the job, and the lack of bias on the part of

the Committee members. Further, no law requires that there be any particular racial composition in Review Committees.

Weighing these factors it is clear to the Court that race did not play a part in the selection of Mr. Dillon over Mr. Page for the PES-18 position. The evidence shows abundant legitimate non-discriminatory reasons for ranking Mr. Dillon ahead of Mr. Page. Experience and job related training were properly considered, together with answers to job related questions by both the first and second Review Committees. The weight of the evidence does not suggest pretext or sham masking a racial motivation. It should also be noted that the Federal Complaints Examiner found no discrimination against Mr. Page based on race in regard to either job vacancy.

Accordingly, for the reasons set out above, the Court will enter judgment for the defendant.

An appropriate order shall issue.

D. Dortch Warriner
United States District Judge

Date: 16 August, 1978

STATEMENT OF FINDINGS AND RECOMMENDED DECISION IN THE DISCRIMINATION COMPLAINT OF CARL F. PAGE DECISION NUMBER: PH07I380132

COMPLAINANT	:	Carl F. Page LSM Supervisor, Tour #1 Richmond, VA SCF
COMPLAINANT'S REPRESENTATIVE:		Kenneth V. Farino, Esq. 7 East Franklin Street Richmond, VA 23219
AGENCY	:	U. S. Postal Service Richmond Post Office Richmond, VA
AGENCY'S REPRESENTATIVE	:	Anthony DuComb, Esq. Law Department Labor Law Field Office P.O. Box 8601-G, Room 915 Philadelphia, PA 19101
COMPLAINT	:	Discrimination because of race (black) and reprisal for filing past EEO complaints; resulting in his non-selection for the position of Postal Operations Specialist, PS-18.

COMPLAINTS EXAMINER	:	Roger A. Schwartz Federal Employee Appeals Authority U. S. Customhouse, Room 501 Second and Chestnut Streets Philadelphia, PA 19106
DATE OF HEARING	:	October 13, 1977
DATE OF DECISION	:	July 12, 1978

I. INTRODUCTION

The date of the alleged discrimination against Mr. Page was August 23, 1976, at which time he was interviewed for the position of Postal Operations Specialist, PS-18. During this interview one of the Promotion Recommendation Panel Board members noted that complainant had filed a previous EEO Complaint. Complainant feels that this comment resulted in his non-selection for the position. The alleged discriminatory officials are identified as Messrs. E. E. Flemming, Jr., District Manager (VA); and A. L. Newcomb, Manager Distribution, Richmond, Virginia, SCF. A formal complaint was lodged by Mr. Page (hereinafter referred to as the complainant) on October 19, 1976, with the Equal Employment Opportunity Officer, Assistant

Regional Postmaster General for Employee and Labor Relations, P.O. Box 8601, Philadelphia, Pennsylvania 19101. The case was received for investigation on February 16, 1977. The investigation was completed on March 24, 1977. An attempt at informal resolution of the subject complaint was made on May 12, 1977, but no agreement could be reached. The complainant was advised on May 12, 1977, that the complaint could not be informally resolved.

The Proposed Disposition of the subject complaint, dated June 16, 1977, stated:

> Full consideration has been given to the reports of the EEO Counselor and the EEO Investigator. The informal adjustment, attempted on May 12, 1977, was unsuccessful.
>
> The evidence of record shows the successful candidate was selected upon proper considerations by two Review Boards. The second Review Board convened after management learned you had been questioned

by a Board member about a prior discrimination complaint which you had filed. There is no evidence of race or reprisal being used as selective factor by either Board.

It is, therefore, proposed that your complaint be closed with a finding of no discrimination based on race and no reprisal.

A request was made on July 14, 1977, by William L. Dodson, Manager, Equal Employment Opportunity Branch, U. S. Postal Service, Eastern Region, Philadelphia, Pennsylvania, that this office supply an EEO Complaints Examiner for a hearing of the Complainant's case. On October 13, 1977, a hearing was held at the Richmond, Va. Post Office, pursuant to that request.

II. BACKGROUND

Pertinent portions of the Investigative Report are adopted as explanation of the background of events leading to this complaint:

. . . .

The complainant applied for a position of Postal Operations Specialist, PES 18 and was not selected for the position, after being interviewed by a review committee, convened by the District Manager.

. . . .

Summary:

A- Circumstances:

Mr. Carl F. Page (black/complt.) testified that on August 23, 1976, nominees were interviewed by the District Convened Promotion Advisory Board, to select the best qualified nominee, for the position of Postal Operations Specialist, SR., in the Richmond, VA Post Office. There were no minority representatives on the board. He stated further that while he was being interviewed, he was questioned by Mr. Newcomb, (white/ ADO), concerning an EEO complaint he had filed previously. Mr. Page testified that Mr. Newcomb's actions indicated to him that he, Mr. Newcomb, could not review his, Mr. Page, qualifications objectively. Mr. Page went on to say that his, Mr. Newcomb, remarks were viewed by him as an attempt to intimidate him and in reprisal, which influenced the other board member. (aff # 1). The complainant stated further that he felt he was the best qualified of the nominees interviewed and he was not awarded the position. (aff # 1).

Mr. Eugene E. Fleming, Jr. (District Mgr. white/ADO) testified that upon learning that a statement has been made that Mr. Page (complt.) had considered as prejudicial, he convened another board on February 10, 1977. This board was to consist of three members of which one was a minority. The scheduled minority member was being sent by the Eastern Region. At a late date it was determined this individual was unavailable and another Eastern Region Manager was substituted. (aff # 2).

. . . .

B- Comparison:

Fourteen nominees for the Position of Postal Operations Specialist, Sr. PES 18, were interviewed, one was reviewed but not interviewed. (exh B) There were eight whites and six blacks interviewed for the position. Five were selected for consideration, two blacks and three whites. (exh B) Mr. Page, the complainant was ranked second by the three board members and was second on the list submitted to the Postmaster for selection. (exh B, C-C2). The five nominees submitted for consideration, all appear to have met all or most of the items in the Standard Position discription. (exh. A3, A6, E, F-F1)

III. ISSUE

Was the complainant discriminated against because of his race (black) when he was not selected for the position of Postal Operations Specialist, PS-18; and/or was his non-selection a result of agency reprisal against complainant because he filed a prior EEO complaint?

IV. ANALYSIS AND FINDINGS OF FACT

The record shows that, one, C.E Dillon (hereinafter referred to as the selectee) was nominated for the subject position by Mr. George M. Trexler, Sectional Director, Mail Processing (H.T., p. 66). The selectee worked with Mr. Trexler, not "for" him. That is, there was no established line of authority which placed Mr. Trexler as the selectee's supervisor. In view of this fact, it was necessary that

Mr. Trexler obtain a concurring nomination of the selectee from the selectee's immediate supervisor, who happened to be the Postmaster (H.T., pp. 69, 70, 68, 185; also see Hearing Exhibit #2, paragraph 6). Complainant's representative implies that there was impropriety in this arrangement because the concurring official (i.e., the Postmaster) was also the selecting official for the position.

Mr. Mizell, the Postmaster, testified that complainant's prior EEO complaint had nothing to do with his personal nomination of the selectee, as opposed to complainant (H.T., p. 115). In addition, Mr. Trexler testified that, subsequent to the nomination, he never discussed the selectee, or complainant, with any members of the first or second advisory

Recommendation Panel, and played no role in the selection process, itself (H.T., p. 67).

Mr. Mizell further testified that, in selecting the first candidate recommended by the advisory panel, he was following the directions of Publication 194 (Hearing Exhibit #1), and its supplemental Regional Instructions (Hearing Exhibit #2 (H.T., p. 110). He further explained that this is his habitual procedure. He can only recall two occasions when he had been reluctant to accept the first employee recommended by a panel, but was overruled by the district manager (H.T., p. 104). Since he was overruled on both occasions, he has made it a consistent practice to select the number one recommendation of the panel (H.T., pp. 115, 116). He fur-

ther states that, had complainant been recommended, he would have selected complainant (H.T., p. 117).

It is clear from this testimony and the exhibits mentioned above, that the Postmaster, as selecting official, was acting on a pro forma basis in selecting the first employee recommended by the selection panel. Therefore, the examiner believes that evidence of discrimination, if it is to be found, will lie in the situation surrounding the second Advisory Promotion Panel, which resulted in the non-selection of complainant. Complainant's representative, however, asserts that there was racial discrimination and reprisal in the actions of the first selection board, whose recommendation was nullified by the agency, upon the re-

seating of a second selecting board; and, that the discriminatory affect of Mr. Newcomb's comments, while a member of the first board, was so persuasive that it was not cured by the reseating and selection recommendation of the second panel (H.T., p. 120).

In order to address this issue, the examiner believes it necessary to first resolve whether Mr. Newcomb's actions did have a discriminatory affect upon complainant's non-selection by the first advisory panel.

Mr. Newcomb acknowledges that, at the end of complainant's selection interview, he asked him a question as to the status of his EEO complaint, which was pending at that time. Mr. Newcomb stated that he had heard about the complaint "through the

grapevine" (H.T., p. 77). In addition, Mr. Newcomb explained that he knew complainant through a mutual friend, who had introduced complainant to him. This mutual relationship kindled his personal interest in complainant's welfare. Therefore, he asserts, his question was motivated by a desire to show an interest in complainant (H.T., pp. 82-84). He also states that his question was asked of the complainant after the formal interview was completed; and that he took this opportunity to ask the question because: "...I do not see (complainant) too often. I just wanted to know how he was making out... This was the only reason I asked (H.T., pp. 78, 79).

Mr. Newcomb further asserts that he did not take complainant's pending EEO complaint into consideration, when recommend-

ing another employee for the promotion (H.T., p. 85). Further, he never discussed complainant's prior EEO complaint with any of the other members of the panel during their deliberations (H.T., pp. 77, 78).

Mr. Tuohy, the head of the selection recommendation panel, agrees that he heard some type of remark regarding complainant's pending EEO complaint, but does not remember what it was (H.T., p. 92). Nevertheless, Mr. Tuohy testified that he cautioned the other panel members, during their deliberations, that such a pending EEO complaint should have no bearing on the qualifications of a candidate (H.T., p. 93).

Mr. Walsh, the third member of the promotion panel, testified that he was not

really aware that complainant had filed an EEO complaint; and he does not recall any questions regarding such a complaint during the interview (H.T., p. 13). He explained that there were about fourteen interviews that day, and he could not recall all the remarks that were made (H.T., pp. 23, 24). Finally, he asserts that the first time he heard about complainant's prior EEO complaint was when the EEO Investigator requested an interview from him regarding the present complaint (H.T., p. 24).

Mr. Ken Reynolds, District Director for Employee and Labor Relations, Virginia District, testified that no one in the agency, besides the EEO specialists, has access to any employee's EEO complaint folders (H.T., p. 39). Mr. Walsh also

stated that no information is kept in an employee's personnel folder regarding his EEO complaint activity (H.T., p. 12). Mr. Walsh concludes that the panel members would have no way of knowing that appellant filed an EEO complaint, from a review of their personnel folders (H.T., p. 13).

The agency alleges that there is no substantial evidence to show that any panel members took complainant's race into account when recommending the selectee for the subject position (H.T., p. 121). In this regard, the examiner agrees that a preponderance of the substantial evidence of record does not show that complainant's race, or the existence of a pending EEO complaint played any part in the deliberations of the first promotion panel when they recommended the selectee, as opposed

to complainant. Nevertheless, the record shows that Mr. Eugene Flemming, District Manager, Virginia District (an alleged discriminatory official) decided to cancel the recommendations of this promotion panel and reseat a second panel, composed of different individuals, in order to avoid the appearance of impropriety or discrimination (H.T., p. 46).

When complainant was interviewed by an EEO counselor relative to this complaint, he indicated that he wanted, as redress for Mr. Newcomb's action:

> Convening of a New Promotional Advisory Board with a minority as a member. Exclude from the board the member who made the statement (Mr. Newcomb). That no reference be made to the new board members of the comments made that he, the complainant, had recently filed an EEO complaint on another issue. That no additional persons be considered.
>
> (See EEO Counselor's report, Investigative File)

The record shows that the agency complied with all his requests, with the exception that a minority member was not obtained to sit on the promotion advisory panel.

Regarding the composition of the promotion panel, Mr. Flemming testified that he is responsible for selecting the employees to sit on the panel (H.T., p. 43). Further, he, himself, has no criteria for selecting panel members; and he does it on a case-by-case basis (H.T., p. 44). He states that he has no records with which to determine the past composition of the various selecting panels he has appointed, as it has never been agency policy to keep such records (H.T., p. 56). However, there are certain rules laid down by Publication 194 and the Regional Instructions, to the affect that a panel member

must be equal to, or higher than, the level of the position under consideration (H.T., p. 44); and, the district representative of the panel must have a functional knowledge of the duties of the position; an installation representative be on the panel; and, since the installation was a sectional center, a member of another sectional center be chosen to sit on the panel (H.T., pp. 51-53, 62, 63).

Notwithstanding the above agency allegations, complainant's representative suggests that the lack of a minority member on both advisory selection panels is supportive of a finding of discrimination in the selection process, because of the subjective nature of their deliberations (H.T., p. 121). In this regard, the agency asserts that there is no require-

ment that it appoint a minority member to a promotion advisory panel; and, the fact, that there was none on these two panels should not be construed as evidence supporting an allegation of discrimination (H.T., p. 123).

Mr. Reynolds supports the agency position (H.T., p. 34). However, he states that there is an agency policy, as articulated in Publication 194 (Paragraph C-4), that every effort be made to obtain a minority, or woman, to sit as a member of the panel (H.T., p. 34). Mr. Flemming asserts that he always tries to comply with this policy, if possible (H.T., p. 47). He further testified that he did not recall why a minority member was not on the first board; but, he explains:

> ... work schedules and such sometimes preclude certain people sitting so I can't say whether I did or didn't because I do not recall when I sat the first board or who was contacted to sit and was not available. (H.T., p. 48).

As previously stated, there are no records relative to the selection of members for the first promotion advisory panel (H.T., p. 48); therefore, absent substantial evidence to the contrary the examiner presumes that a bona fide attempt was made by the agency to find a minority, or woman to sit on the panel.

Mr. Flemming does recall his attempt to obtain a minority member for the second panel that was seated. In this regard, his efforts required that he make a request for a panel member from outside of the district (implying that none was available within the district) (H.T., p.

55). He proved successful, in that a minority member was assigned to sit on the panel. However, Mr. Flemming asserts, just prior to convention of the panel, that individual was assigned to an "Officer in charge" position, which preempted his appearance as a member of the panel. Therefore, another individual was selected to sit on the panel who was a non-minority (H.T., pp. 46, 47).

Notwithstanding the above agency explanation, complainant alleges that a minority individual was available to be included in the board, and the agency should have appointed him (H.T., p. 121). Mr. Tuohy, admits that two minority employees, Mr. Rainey and Mr. Barnes, are frequently called to sit on such panels (H.T., p. 102). The examiner notes however, that

there was no evidence submitted by the agency or by the complainant to show that these individuals were available, at the time, to sit on the panel. Mr. Mizell's testimony sheds some light on this, in that he states Mr. Rainey was not picked because " . . . (t)he highest level position possible in mail processing should have been serving on the board, and in this case it was the manager of distribution" (who was, presumably, not Mr. Rainey) (H.T., p. 115).

The guidelines of agency Publication 194 and its regional supplement indicate that, while it is desirable to have a minority member on the advisory selection panel, this is not an absolute requirement. The agency asserts that it made a bona fide effort to accede to complainant's wishes

in this regard, when seating the second panel board; however, it proved administratively impracticable. The examiner finds no substantial evidence in the record that tends to rebut this allegation. Therefore, the examiner does not find that the lack of a minority member on the promotion advisory panel constitutes substantial evidence in support of a finding of discrimination in this case.

As stated above, complainant protests the subjective nature of the selection process for this position. He believes that a lack of objective guidelines for evaluating candidates for this position allows racial discrimination to operate, unchecked, in the agency. In reviewing the record on this issue, the examiner notes the agency allegation that the issue of the

issue of the panel's procedures are not material to the complaint, because not mentioned in the complaint as the reason for the alleged discrimination (H.T., p. 122). The examiner does not agree that this issue is immaterial. The examiner believes that the subjective nature of a selection process can be used as supportive evidence in making a finding of discrimination, when other objective evidence is available to show that the complainant was probably better qualified than the selectee for the position. Therefore, the examiner will review the evidence on the advisory panel recommendation process, and the qualifications of complainant, as opposed to the selectee.

Mr. Flemming agreed that there were no established, objective, guidelines in

existence for evaluating candidates for the position in question (H.T., p. 50). Mr. Walsh, a member of the first advisory panel, testified that the selection recommendation was based on a personal interview of the candidates, with a review of their personnel folder, performance evaluation, and personal history statements (i.e., education and other work related activity)(H.T., p. 8). He stated that the individuals on the advisory panel had discretion to decide what weight would be given to the various factors (H.T., pp. 11, 12). Mr. Tuohy also agreed that there was no objective criterion used to determine what weight would be given each factor, such as education or experience; and that each board member made his own determination, when weighing the qualifications of each

candidate (H.T., p. 94). The standard comment of Mr. Tuohy, Mr. Walsh, and Mr. Newcomb, was that the selectee was picked after a comprehensive, but subjective, evaluation of the documents supporting each employee's candidacy for the position (H.T., pp. 9, 10, 75, 76, 21). The examiner notes, however, that Mr. Tuohy did prepare a "spread sheet" as a tool for comparison of all the candidates, when deliberating on the final selection recommendation (H.T., p. 74, 91).

The examiner agrees that the selection process was highly subjective in nature. He also believes that the process could have been improved, and consistency assured, by an agreement beforehand, by all the members of the panel, as to what factors would be given greater weight than others.

The evidence indicates that this was not done; the examiner believes that such an omission allows great margin for subjective inconsistency among the panel members' evaluations of the candidates. However, in this case, the record shows that there was no disagreement or inconsistency among the panel members as to whom they considered to be the best qualified employee for the position. It is established that the selectee was unanimously considered to be the best qualified of all the candidates (H.T., pp. 99, 100, 15, 25).

The examiner's independent review of the qualifications of complainant and the selectee reveals the following comparison:

COMPLAINANT

Performance Evaluation:

3 "very high"
2 "exceptionally high"

Education:

3 1/2 years College
12 PS Training Courses

Length of Service:

12 years
5 years above PS-14 level

Supporting Comments:

Highly positive

SELECTEE

Performance Evaulation:

All "exceptionally high"

(Selectee has better evaluation)

Education:

1 1/2 year College
8 PS Training Courses

Length of Service:

16 years
4 years above PS-14 level

Supporting Comments:

Highly positive

This comparison shows that complainant has more formal education than the selectee and slightly more supervisory experience than selectee. On the other hand, the selectee has a higher performance evaluation (although both evaluations are close to outstanding in nature) and greater length of service than the complainant. Both employees appear to be highly qualified for the position; therefore, the examiner does not believe it is clear, from this comparison, that complainant is better qualified than the selectee, for the position in question.

Finally, the agency asserts that the complainant has not carried his burden of proof, to show a prima facie case of discrimination (H.T., p. 121). Our review of the evidence suggests the same conclu-

sion. While the complainant has established the facts that he is a member of the protected class; that he is employed by the agency; that he has applied for the position in question; and that he was not selected, despite his qualifications for the position -- he has not shown that the position remained open after his non-selection and that the agency continued to seek applicants with his qualifications, or less (McDonnel-Douglas Corp. v. Green, 93 S.Ct. 1817 (1973)); that the supervisor responsible for the selection demonstrated a predisposition toward discrimination in other matters (Pettit v. U.S., 488 F.2d 1026 (1973)); or, that the criteria used to determine job qualifications, and/or selection, operates to disproportionately exclude members of his class (Griggs v. Duke Power Co., 401 US 424 (1971)).

In addition, we note Mr. Flemming's testimony that he will reseat a promotion advisory panel when he sees something in the process that does not look proper; and that he had done this three times in two years (H.T., pp. 54, 55). Further, that he reconvened a second panel specifically because of Mr. Newcomb's remarks to complainant, about his EEO complaint (H.T., pp. 38, 39). The agency asserts that this evidence shows the complainant has received substantially all the redress he has asked for in his complaint, except the appointment of a minority member to the selection advisory panel, which was unavoidable; and, therefore, the complaint is moot (H.T., pp. 122, 123). After the examiner's complete review of all the documents and evidence of record, andnoting that no evidence was presented

regarding possible discrimination by the second advisory panel, which resulted in the non-selection of complainant for the position in questions; he concurs with the agency position on the matter.

V. CONCLUSION

The complainant has not produced a preponderance of substantial evidence to show that he was discriminated in his non-selection for the position of Postal Operations Specialist, PS-18. The complainant has received substantially all the remedies requested in his complaint, and has not shown that the final selection by the second advisory promotion panel was motivated by discrimination against him because of his race (black), or as reprisal for filing a prior EEO Complaint.

VI. RECOMMENDED DECISION

The examiner recommends a finding of no discrimination or reprisal in the matter complained of.

/s/ Roger A. Schwartz
Roger A. Schwartz
EEO Complaints Examiner

ANALYSIS, FINDINGS, AND RECOMMENDED
DECISION
IN THE CASE OF
MR. CARL F. PAGE
DECISION NUMBER AT071370119

COMPLAINANT:	Mr. Carl F. Page 2609 Northumberland Avenue Richmond, Virginia 23220
REPRESENTATIVE:	Ms. Stephenie J. Valentine Attorney at Law 214 East Clay Street Richmond, Virginia 23219
AGENCY:	U. S. Postal Service Richmond Post Office 1801 Brook Road Richmond, Virginia 23232
REPRESENATIVE:	Mr. W. Eric Dowdy Richmond Post Office 1801 Brook Road Richmond, Virginia 23232
COMPLAINT:	Discrimination based on race (black) in connection with his nonselection for promotion to the position of General Foreman, Tour 3, at the Richmond, Virginia Post Office

COMPLAINTS
EXAMINER: Mr. R. J. Payne
Federal Employee Appeals
Authority
U. S. Civil Service
Commission
1340 Spring Street, N.W.
Atlanta, Georgia 30309

DATE OF HEARING: March 23,1977

I. Introduction

The complainant, Mr. Carl F. Page, is a Supervisor, Mails, MP-LSM, PMS-16, with the U. S. Postal Service, Richmond Post Office, Richmond, Virginia. He alleged discrimination because of his race (black) in connection with his nonselection for promotion to the position of General Foreman, Tour 3, at the Richmond, Virginia Post Office, on or about January 3, 1976.

Counseling and investigative procedures failed to resolve the complaint. The complainant requested a hearing which was held in Richmond, Virginia on March 23, 1977. A verbatim transcript of the proceeding has been made a permanent part of the record in this case.

II. Background

The record reflects that on or about November 12, 1975, "Requests for Nominations" were invited for three positions; including the position of General Foreman, Mails, PES-17, at the Richmond, Virginia Post Office. Nominations were received for the General Foreman position and the names of nine employees (four blacks and five caucasians) were submitted to the District Manager - Virginia District of the U. S. Postal Service by Mr. J. G. Mizell (caucasian), Sectional Center Manager/Postmaster of the Richmond, Virginia Post Office. A District Review Committee composed of Mr. T. A. Tuohy (caucasian), Director of Mail Processing, Virginia District; Mr. George N. Trexler (caucasian), Sectional Center Director, Mail Processing, Richmond, Virginia; and John Kettner

(caucasian), Sectional Center Director, Mail Processing, Petersburg, Virginia, met on December 22, 1975 to review those employees nominated for the General Foreman position. This Review Committee forwarded a list of three names to Mr. J. G. Mizell recommending that Mr. C. G. Campbell, Jr. (caucasian), be selected to fill the position. Mr. Campbell had been designated by the Committee as the best qualified candidate, and the complainant had been designated as the third best qualified candidate on the list submitted to Mr. Mizell. Mr. Mizell followed the recommendation of the Committee and Mr. C. G. Campbell, Jr. was selected for the position. His selection gave rise to the present complaint.

III. Issue Considered

Was the complainant discriminated against because of his race (black) in connection with his nonselection for promotion to the position of General Foreman, Tour 3, at the Richmond, Virginia Post Office, on or about January 3, 1976?

IV. Findings of Fact and Conclusion

The complainant alleges that his nonselection for promotion to the General Foreman position was the result of discrimination based on his race (black). In support of his allegation, the complainant contended that there was "pre-selection" in the promotion action, as evidenced by the following:

1. The promotion, although announced on January 27, 1976, was made effective retoractive to January 3, 1976.

2. The selectee was detailed to the position of Acting General Foreman on Tour 3 in August 1975.
3. The selectee was sent to a three-week training course (Mail Processing Managers Action Series) a few weeks prior to his selection.
4. No interviews were conducted by the promotion panel.
5. The selectee's experience, job performance, and educational background were not equal to the complainant's.

The complainant alleged that the announcement of the promotion action in question evidenced pre-selection; specifically, the fact that the announcement was issued on January 27, 1976, but showed the effective date of the promotion as January

3, 1976. In this respect, testimony given at the hearing by Mr. J. M. Stone (caucasian), Sectional Center Director, Employee and Labor Relations, revealed that normally there is a "time lag," usually three to four weeks, between the selection of an employee for promotion and the preparation of the official paperwork in the Data Center in New York documenting the promotion action. Mr. Stone testified that the promotion is not publicized until the official documentation (SF-50) is returned to the agency by the Data Center. In this case, the record reflects that Mr. Campbell's promotion was made effective for the next pay period (i.e., the first pay period in January) following the date of his selection for promotion in December 1975; but, due to the time lag discussed earlier in processing the

paperwork, was not announced until January 27, 1976. It is significant to note that the same announcement reflected that a black employee was promoted to a PES-18 position, and that the effective date of this promotion action was shown as December 20, 1975, which is also prior to the date of the announcement in question.

In light of the foregoing, it is found that there was nothing unusual with respect to the matter complained of by the complainant. It is further found that the testimony given by Mr. Stone, in the absence of any evidence to the contrary by the complainant, is a plausible explanation as to why the effective date of the promotion was prior to the date the promotion was announced. Accordingly, it is found that the matter complained of

concerning the announcement does not evidence pre-selection.

The complainant alleged that the detail of Mr. Campbell to the position of Acting General Foreman, Mails, in August 1975, evidenced pre-selection; presumably because it gave him an edge over the complainant when the position became available for permanent fill. However, the record reflects that the complainant had also been detailed to an Acting General Foreman position (that of General Foreman, Mechanization) and that this detail commenced some two months prior to the detail of Mr. Campbell. The complainant was unable to develop any evidence that Mr. Campbell's detail was for the purpose of better preparing or qualifying him for the position of General Foreman, Mails

when it was announced for permanent fill in December 1975, nor does a review of the record reveal any evidence that such was the case. Accordingly, no irregularity is found with respect to Mr. Campbell's detail, nor does such detail evidence pre-selection in this case.

The complainant alleged irregularity in the fact that Mr. Campbell was sent to a three-week training course (i.e., Mail Processing Managers Action Series) a few weeks prior to his selection for the position in question. Specifically, the complainant alleged that this was done in order to give Mr. Campbell an edge in the selection process for the General Foreman, Mails position. In this respect, testimony given by Mr. P. E. Dowdy (caucasian), Manager of the Postal Development Educa-

tion Center (PDEC) at the Richmond, Virginia Post Office, revealed that the PDEC participated in the development of the course in question for the Bethesda School of Postal Training, and that the basic information, films, etc., for the course were prepared at the Richmond Post Office. Mr. Dowdy testified that the Bethesda School of Postal Training utilized a validation program to ascertain if the information contained in the program was factual. In this connection, Mr. Dowdy testified that Dr. Franklin, Administrator of the Bethesda School of Training and the Director of the validation program, called the PDEC and requested that an employee be sent from the Richmond Post Office to participate in the validation program. Mr. Dowdy testified that he reviewed the records of the employ-

ees available and submitted them to Dr. Franklin who chose Mr. Campbell to attend the course. Mr. Dowdy testified that the request for a participant in the validation program, and also the final selection of Mr. Campbell, were handled by telephone and accomplished in the same day. Mr. Dowdy further restified that at no time did local management officials at the Richmond Post Office indicate to Dr. Franklin that they wanted Mr. Campbell to attend the course. Mr. Dowdy also testified that the race of the employees available for the program was never mentioned in his discussions with Dr. Franklin. It is noted that the testimony given by the three Review Committee members reveals that Mr. Campbell's participation in the particular course in question was not s significant or controlling

factor in his being rated higher than the complainant on the recommendation submitted to Mr. Mizell. Accordingly, it found that Mr. Campbell's participation in the Mail Processing Managers Action Series course does not evidence pre-selection in this case.

The complainant also alleged that the absence of interviews during the selection process evidenced pre-selection. In this respect, testimony given by the three Review Committee members indicated that no interviews were held because at least two of the Committee members were personally familiar with all of the candidates for the position, and because the forms 991 and 2577 of each candidate adequately reflected their qualifications, background, etc.

The complainant was unable to develop any evidence, nor does the record reflect, that the absence of interviews in a promotion action, specifically in situations where the majority of the Review Committee members are personally familiar with the candidates, was unusual or against Postal regulations. Accordingly, it is found that the absence of interviews in this case does not evidence pre-selection.

The complainant also alleged that his experience, job performance, and educational background were superior to Mr. Campbell's, and that this evidenced pre-selection. However, a review of the records of both the complainant and Mr. Campbell; specifically, the forms 2577 and 991 of each of these employees,

does not support the complainant's allegation. In this respect, a review of the forms in question reveals that Mr. Campbell had a slightly better performance evaluation than the complainant; that both Mr. Campbell and the complainant had equal educational background; that both had equal Postal background experience; that Mr. Campbell had a more extensive employment background outside of the Postal service; that Mr. Campbell participated in more civic/fraternal organizations, and received more awards than the complainant; and that Mr. Campbell had an edge in the number of Postal training courses taken. Accordingly, it is found that the forms 2577 and 991 indicate that Mr. Campbell had the superior qualifications of the two.

In light of the foregoing, it is found that the five factors cited by the complainant to support his allegation of pre-selection, whether considered singularly or in combination, do not tend to evidence that Mr. Campbell was pre-selected for the position of General Foreman, Mails.

The complainant further alleged at the hearing that management's action in not promoting him to the PMS-16 level in October 1975 may have hampered his selection for the General Foreman position at issue in this case. Specifically, the complainant contended that his forms 2577 and 991 should have shown him as a PMS-16, rather than a PMS-15. However, such an allegation was not made a matter of formal complaint, made the subject of investigation, nor covered by the agency

in its proposed disposition. Accordingly, it is found that this particular allegation has not been accepted for processing by the agency; and, therefore, it will be given no further consideration.

There was also some question at the hearing as to why Mr. Campbell was shown as Acting General Foreman, PES-17, on the list of candidates sent to the Review Committee; while the complainant, also an Acting General Foreman, PES-17 at that time, was listed as Foreman, Mails (his regularly assigned position). In this regard, testimony given by Mr. J. M. Stone revealed that his secretary prepared the list of candidates to be referred to the Review Committee, and that is was her usual practice to obtain each candidate's present position from either form 2577

(prepared by the employee's supervisor), or form 991 (prepared by the employee). A review of Mr. Campbell's 2577 and 991 submitted for consideration in this promotion action reflected his present position as Acting General Foreman, while the complainant's 2577 and 991 reflected his present position as Foreman, Mails.

The record does not reflect any irregularity in Mr. Campbell or his supervisor listing his present position as Acting General Foreman, as Mr. Campbell was acting in that capacity at the time that the forms were filled out. In this regard, the record reflects that it would also have been proper for the complainant or his supervisor to list the complainant's present position as Acting General Foreman as the complainant, like Mr. Campbell,

was acting in that capacity at the time his forms were filled out. In this connection, testimony given by Mr. Stone indicated that an employee should list the position he is currently working in at the time he is being considered for a particular selection action; which, in the case of Mr. Campbell and the complainant, would have been that of Acting General Foreman. In any event, it is noted that the content of both form 2577 and form 991 submitted by Mr. Page did reflect that he was performing duties as an Acting General Foreman at the time of the selection action, and that such information would have been noted and considered by the Review Committee members in making their recommendation. Accordingly, the fact that the submission of candidates to the

Review Committee listed only Mr. Campbell as an Acting General Foreman would not have given him an edge in the selection process, nor give evidence of any pre-selection in this case.

As noted earlier, the Review Committee was comprised of three Postal officials, Mr. Tuohy, Mr. Kettner, and Mr. Trexler. All three committee members testified at the hearing concerning their respective reasons for considering Mr. Campbell to be superior to the complainant in the selection action at issue in this case.

Mr. Tuohy testified that he was not familiar with either Mr. Page or Mr. Campbell at the time of the selection process. Mr. Tuohy testified that he gave substantial weight in the selection process to each candidate's experience, and formal

education in relation to actual experience. Mr. Tuohy testified that he placed importance on each employee's form 2577, and that Mr. Campbell's 2577 was better than Mr. Page's and the other candidates. Mr. Tuohy further testified that the forms 991 of both Mr. Page and Mr. Campbell reflected that both were equal in formal education; that Mr. Campbell had more experience in previous employment outside the Postal service; that Mr. Campbell had more Postal experience; that both were equal in supervisory experience; that Mr. Campbell had more participation in civic and fraternal organizations; that Mr. Campbell had more awards; and that Mr. Campbell had an edge in the training courses. Mr. Tuohy testified that in light of the foregoing, he selected Mr. Campbell as his number one choice

to fill the position. Mr. Tuohy further testified that the race of the candidates was not a factor considered in his recommendation.

Mr. Kettner's testimony revealed that he had worked in the Richmond Post Office from 1958 to 1974 in various areas, such as: Mail Processing, Parcel Post, Permit Section, and Quality Control, and that he knew Mr. Campbell, Mr. Page, and the other candidates. Mr. Kettner testified that both Mr. Campbell and Mr. Page had worked directly under him as Acting Supervisor of Mail. Mr. Kettner testified that he made his judgment as to the best qualified candidate based on the information contained on the forms 2577 and 991 of each candidate, as well as his personal knowledge of the candidates; and that he

felt that Mr. Campbell was the best qualified overall. Mr. Kettner testified that race was not a factor considered in his selection of Mr. Campbell as the best qualified candidate.

Mr. Trexler testified that he knew both Mr. Campbell and Mr. Page in a working relationship, and that Mr. Campbell had been under his supervision prior to the convening of the Review Committee. Mr. Trexler's testimony revealed that his supervision of Mr. Campbell was not direct but through intervening management personnel. Mr. Trexler testified that he reviewed each candidate's form 2577 and form 991 and weighed the various attributes and information reflected for each candidate on these forms; such as training, length of service, supervisory experience,

etc. Mr. Trexler testified that after a review of the information on these forms, he felt that Mr. Campbell was the best qualified candidate. Mr. Trexler further testified that race was not a factor in his recommendation of Mr. Campbell as the best qualified candidate; and that the race of none of the candidates was mentioned or considered by the Review Committee.

The complainant sought to show at the hearing that the Review Committee members belonged to one or more of the organizations listed by Mr. Campbell on his 991, and that this was a factor leading to his selection. In this respect, testimony given by the three Review Committee members revealed that only Mr. Trexler belonged to an organization (i.e., the Masons)

listed by Mr. Campbell on his form 991. However, Mr. Trexler's testimony also revealed that he did not know Mr. Campbell as being a Mason prior to the time the Review Committee was convened. In any event, it is found that whether or not Mr. Campbell or any of the Review Committee were members of an organization listed by Mr. Campbell on his 991 would not support the complainant's allegation of racial discrimination absent a showing that the particular organization had a policy of excluding blacks. There has been no such showing in this case.

In light of the testimony given by the three Review Committee members, when compared to an independent review of the forms 2577 and 991 of Mr. Page and Mr. Campbell, it is found that the reasons

stated by the Review Committee members for Mr. Campbell's being considered the best qualified candidate were valid. It is further found that there was no evidence developed at the hearing, nor is any reflected in the investigative file, that race was a factor considered by any of the Review Committee members in reaching their decision to recommend Mr. Campbell as the best qualified candidates.

The testimony of Mr. L. C. Rainey (black), which was developed through a deposition obtained subsequent to the hearing, revealed he had nominated the complainant for the position in question along with other employees on Tour 1, and that he felt the complainant was the best qualified of the employees he nominated. Mr. Rainey, a Superintendent of Mails on Tour

1, and the complainant's supervisor, testified that he had reviewed the 991's of Mr. Campbell and the complainant and did not feel that Mr. Campbell was superior to the complainant in experience, education, and other related matters.

The questioning of Mr. Rainey by the complainant and his representative during the deposition was designed to show that Mr. Rainey felt the complainant was better qualified then Mr. Campbell for the position at issue. However, in this respect, it was brought out that Mr. Campbell had never been under the supervision of Mr. Rainey, and that Mr. Rainey had no personal knowledge of Mr. Campbell's ability, qualifications, work performance or potential. Mr. Rainey further testified that his judgment that the complainant was better

qualified that Mr. Campbell was based on knowledge he "already had," rather than on the forms 2577 and 991 of each candidate which were reviewed by the Committee members; and that such knowledge was gained both before and after Mr. Campbell's selection for the position. In light of the foregoing, and especially in light of the fact that Mr. Rainey's opinion as to the qualifications of both employees was apparently based to a great extent on information or knowledge he obtained subsequent to the promotion action, it is found that Mr. Rainey's assessment of the relative qualifications of the two employees for the position in question must be given lesser weight than that related by the three Review Committee members.

The questioning of Mr. Rainey by the complainant and his representative was also designed to show that management's actions in this case were an attempt to insure Mr. Campbell's selection for the position at issue. However, a review of Mr. Rainey's testimony revealed that he was not testifying from any direct knowledge of the actions taken by management officials in this case, but rather that he was only expressing his opinion about what had happened.

It is significant to note that testimony given by Mr. Rainey in his deposition revealed that at the time of the complaint in late 1975 and early 1976, Mr. Trexler supervised 11 middle-management positions in his capacity as Sectional Center Director of Mail Processing at the Richmond,

Virginia Post Office; i.e., 3 Tour Superintendents (all caucasians), and 8 General Foremen (5 caucasians and 3 blacks). Testimony given by Mr. Rainey further revealed there are presently 3 Tour Superintendents (2 caucasians, and 1 black), and 6 General Foreman (3 caucasians and 3 blacks) under the supervision of Mr. Trexler. Assuming that the figures related by Mr. Rainey are correct, it is found that such figures indicate that blacks have not been excluded from middle-management positions under the supervision of Mr. Trexler, and that the complainant's nonselection for the General Foreman position at issue in this case was based on factors other than his race.

In light of the foregoing findings, and a complete review of the evidence of record,

including the hearing transcript and the deposition of Mr. Rainey, it is concluded that there is no evidence that the complainant's race was a factor considered in his nonselection for the position of General Foreman, Tour 3.

V. Recommended Decision

The evidence does not support a finding of racial discrimination in this case.

/s/ Randy J. Payne
RANDY J. PAYNE
Complaints Examiner